TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 206.

HENRY BRINKMEIER, PLAINTIFF IN ERROR,

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF [illegible]

FILED FEBRUARY 10, 1912.

(22,016.)

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1 In the Supreme Court of the State of Kansas.

No. 16090.

HENRY BRINKMEIER, Plaintiff in Error,
v.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant in Error.

Be it remembered, that on the 11th day of July, A. D. 1908, there was filed in the office of the clerk of the supreme court of the state of Kansas, a petition in error and case made attached thereto and made a part thereof, which petition in error and case made are in words and figures as follows, to-wit:

2 Filed July 11, 1908. D. A. Valentine, Clerk Supreme Court.

In the Supreme Court of the State of Kansas.

No. 16090.

HENRY BRINKMEIER, Plaintiff in Error,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant in Error.

Petition in Error.

The said Henry Brinkmeier, plaintiff in error, complains of the defendant in error, The Missouri Pacific Railway Company, that the said Missouri Pacific Railway Company, defendant in error, at the April, 1908, term of the district court of Sedgwick County, Kansas, recovered judgment by consideration of said court against said Henry Brinkmeier, in a certain action then pending in said court, wherein said Henry Brinkmeier was plaintiff, and said Missouri Pacific Railway Company was defendant. The original Case-Made in said cause, duly signed, settled, certified, attested and filed, is hereto attached, marked Exhibit "A", and made a part of this petition in error. And said Henry Brinkmeier, plaintiff in error, avers that there is error in said record in said proceedings in this, to-wit:

I.

The said district court of Sedgwick County, Kansas, erred in sustaining the demurrer interposed by the defendant in error to the evidence interposed on behalf of the plaintiff in error.

II.

Said District Court of Sedgwick County, Kansas, erred, in denying plaintiff's—plaintiff in error herein—application to amend his petition to conform to the facts proved.

III.

The District Court of Sedgwick County, Kansas, erred in overruling the motion of said plaintiff in error for a new trial.

3 IV.

That the said District Court of Sedgwick County, Kansas, erred in rendering judgment in favor of said defendant in error when, according to the law and evidence, it should have rendered judgment in favor of said plaintiff, plaintiff in error herein.

V.

Said district court of Sedgwick County, Kansas, erred, in rendering judgment for said defendant in error and against said plaintiff in error.

VI.

Judgment was rendered in favor of said defendant in error when according to the law and evidence, it should have been rendered in favor of the plaintiff in error.

VII.

There are other errors prejudicial to said plaintiff in error manifest on the face of the record herein.

Wherefore, Said plaintiff in error prays that said judgment so rendered may be reversed and set aside and held for naught, and that judgment may be ordered to be rendered in favor of said plaintiff in error and against said defendant in error, upon evidence introduced on behalf of the plaintiff in error; that said judgment so rendered be reversed and set aside and held for naught and that the District Court of Sedgwick County, Kansas, be ordered to overrule the demurrer interposed by the defendant in error; and that plaintiff in error be restored to all the rights he has lost by the rendition of such judgment, and for such other and further relief as to the court may seem just and proper.

C. V. FERGUSON AND
KOS & V. HARRIS,
Attorneys for Plaintiff in Error.

Filed July 11, 1908.

D. A. VALENTINE,
Clerk Supreme Court.

4 In the District Court of Sedgwick County, Kansas.

No. 21554.

HENRY BRINKMEIER, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Case Made.

Filed Jul. 11, 1908.
D. A. VALENTINE,
Clerk Supreme Court.

Be it remembered, That the plaintiff herein, Henry Brinkmeier, commenced his action against the defendant herein, The Missouri Pacific Railway Company, a corporation, by filing in the office of the Clerk of the District Court of Sedgwick County, Kansas, on the 15th day of March, 1901, his petition, and thereafter the following proceedings were had, to-wit:—

Filed Jul. 8, 1908.
RAY L. TAYLOR, *Clerk.*
S. N. BRIDGMAN, *Deputy.*

5 In the District Court of Sedgwick County, Kansas.

21554.

HENRY BRINKMEIER, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, a Corporation, Defendant.

Entry.

Now on this 25th day of November, 1901, this cause came on to be heard upon the application of the plaintiff made in open court for leave to file an amended petition, whereupon the defendant by leave of the court withdraws its motion heretofore filed to make petition of the plaintiff more definite and certain and the plaintiff was thereupon granted leave to file an amended petition, defendant to have until December 23rd, 1901, thereafter to plead to said amended petition.

D. M. DALE,
Judge of District Court.

O. K.
D. SMYTH.
C. V. FERGUSON.

#21554. Brinkmeier vs. Mo. Pac. Ry. Co. Filed Dec. 6, 1901. Fred F. Williams Clerk. Grant Knepple, Deputy.

6 In the District Court of Sedgwick County, Kansas.

No. 21554.

HENRY BRINKMEIER, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, a Corporation, Defendant.

Amended Petition.

The plaintiff, Henry Brinkmeier, by leave of this court first had *and* files this, his amended petition and alleges and says that the Missouri Pacific Railway Company is and was at all times hereinafter mentioned, a corporation legally existing and doing business under and pursuant to the laws of the State of Missouri; and doing business as a Railway Company, as a common carrier into and through the Counties of Sedgwick and Reno in the State of Kansas and into the States of Colorado, Nebraska, Missouri, Arkansas, Texas, Oklahoma and Indian Territory.

For cause of action against said defendant, The Missouri Pacific Railway Company, plaintiff alleges and says that for more than seventeen (17) years last passed, plaintiff has been engaged in railroad business and has no other business or occupation; that on or about the 12th day of November, 1900, and for a long time prior thereto, plaintiff was employed by said defendant in the capacity of conductor and brakeman on defendant's trains and on said date was at his accustomed work in the capacity of brakeman on one of defendant's freight trains at or near the City of Hutchinson in the County of Reno, in the State of Kansas.

That on or about the 12th day of November, 1900, said plaintiff in the performance of his duties, was engaged in coupling two of the defendant's cars together upon the side track or switches of the defendant road and in order to perform said work it was necessary, prudent and proper for him to be upon the ground between said cars and between the rails or just outside of
7 the rails of defendant's road; that the duties of the plaintiff, as brakeman, required him to see that the draw bars attached to said cars by which said cars were coupled were in the center of said cars their proper place before said cars came together to be coupled.

That one of said cars to be coupled was standing still, with several other cars coupled to it, and the car to which it was to be coupled was moving, with several other cars coupled to it, and that the draw bars on said cars to be coupled was out of their proper place the same being improperly constructed and was out of repair as to allow them to be and remain to the side from the center of said cars, their proper place.

That the draw-bars on defendant's cars are constructed of heavy iron attached to the body of the car on the under side and passing

through an opening at the end of the car leaving one end on the outside at the end of the car so that it may be coupled with other cars, the other end of said draw-bar being attached and connected to the draw-bar on the other end of the car by two rods of iron; that said cars and draw-bars were improperly, negligently and carelessly constructed, defective and out of repair, in that the opening through which said draw-bars passed was made and worn too large allowing the draw-bars to move up and down and from side to side and not remain in the center of the car so that the couplings could connect when said cars were brought together, said couplings were designed to connect only when brought together in direct line in the center of said car.

That the rods connecting said draw bars were improperly, negligently and carelessly constructed, defective and out of repair in that they were not of even length and that under power and pressure from the opposite end of the car threw the draw-bars, with which the plaintiff was working, to one side from the center of said cars where they were held with such force that it required the
8 force, weight and strength of the plaintiff to place said draw-bars in the center of said car which were applied by placing his right foot against said draw-bar and holding to the iron hand-holds on the end of either car which were constructed and used for such purpose, which was necessary, prudent and proper in the discharge of his duties.

That the couplings or draw-bars and their connections, on said cars, constructed and used as above mentioned and described, carried and held the said draw-bars from the center of said cars so that it was impossible for the draw-bars and couplings to work as they were designed and intended to be used unless said draw-bars were placed and held in the center of said cars until couplings were made and draw-bars joined together.

That the switch or side track of the defendant on which said cars were, were negligently and carelessly constructed and out of repair, uneven and rough and without sufficient strength and not a sufficient number of cross ties and without a sufficient earth or other material to hold them in proper place, thereunder, to render said track safe; that said moving car at the time plaintiff was adjusting the draw-bar to its proper place was lurched and swung sidewise and lowered by reason of said track giving down and sinking into the earth, thereby throwing the moving car and draw-bars to one side and downward from the center thereby preventing said draw-bars and couplings from working and connecting with each other as intended.

Plaintiff alleges that it was the duty of the defendant company to have carefully and properly constructed, inspected and operated said cars and draw-bars, couplings, side-tracks and switches and appliances necessary to the running, operating and handling said cars safely but that said defendant neglected to so properly construct its cars, tracks, side-tracks and switches and cars; that the de-

fects in the construction of said tracks, side-tracks and
9 switches, cars and draw-bars, couplings and appliances, inspection and use of said cars and other appliances of draw-bars, couplings, etc., were hidden and not visible to the plaintiff while in the discharge of his duties as brakemen and that he had no notice thereof whatever.

That the plaintiff exercising proper care attempted to place said draw-bars in their proper places in the center of said cars but that said draw-bars on said cars failed to work properly when they came together in consequence of the things hereinbefore set out by reason of the negligence and carelessness of the defendant in the construction, maintenance and operation of its said cars, tracks, switches, and side-tracks, draw-bars, couplings, etc., the plaintiff's foot was caught between said draw-bars and cars and was bruised, broken and crushed to such an extent that it was necessary to amputate plaintiff's right leg between the ankle and knee joint.

Plaintiff further alleges that he was injured as aforesaid without any fault or negligence whatever on his part. That a more particular and accurate statement as to the defects in the construction, maintenance and operation and use of the defendant's cars, draw-bars thereon and other attachments pertaining to said draw-bars, on said cars cannot be given by this plaintiff for the reason that immediately after the accident and injury sustained by the plaintiff and while he was in great bodily pain and mental anguish and on said 12th day of November, 1900, the defendant through its servants, agents and employees, whose names to the plaintiff are unknown, took said cars and made repairs and changes upon them and their appliances, draw-bars and attachments and transported same to other parts of its system of railroad so that the plaintiff had no opportunity to examine same for more accurate examination as to said imperfections, defects and conditions.

10 That the defendant, its servants, agents and employees after due demand and request, has failed and refused to give this plaintiff any information as to the condition of said cars, draw-bars or attachments or changes and repairs of the said draw-bars or other appliances and attachments on or made to and upon said cars. That by reason of the negligence of said defendant, this plaintiff has been permanently injured in the loss of his right foot. That he suffered and continues to suffer great pain and has been compelled to expend large sums of money in and about the treatment and care of said limb and in and about the amputation of said foot. That he has been rendered wholly incapable to pursue his usual occupation and rendered a cripple for life to his damage in the sum of twenty-five thousand dollars ($25,000.00).

Wherefore, The plaintiff demands judgment against the defendant, The Missouri Pacific Railway Company, for the sum of Twenty-five Thousand Dollars ($25,000.00) damages with interest at 6% from this date, and for his costs in this action, and for such other and further relief as he may be entitled.

C. V. FERGUSON,
Attorney for Plaintiff.

#21554. Brinkmeier, Plf. vs. Mo. Pac. Ry. Co., Deft. Amended Petition.

Filed Dec. 4, 1901.
FRED F. WILLIAMS, *Clerk.*
GRANT KNEPPLE, *Deputy.*

11 In the District Court of Sedgwick County, Kansas.

No. 21554.

HENRY BRINKMEIER, Plaintiff,
v
THE MISSOURI PACIFIC RAILWAY COMPANY, a Corporation, Defendant.

Motion.

Now comes the defendant, The Missouri Pacific Railway Company, and moves the court to require said plaintiff to make his amended petition filed herein more specific, definite and certain, in this, to wit:

1st. That he state more definitely and certainly at what place on the line of the defendant's railroad he was engaged in coupling or attempting to couple two of defendant's cars together at the time he sustained the injuries complained of.

2nd. That he state more definitely and certainly where the switch or side-track referred to in said amended petition was located.

3rd. That he state more definitely and certainly at what place on said switch or side track the moving car mentioned in said petition was "lurched and swung side-wise and lowered" at the time plaintiff was adjusting the draw-bar to its proper place, as alleged.

4th. That he state more definitely and certainly in what manner plaintiff attempted to place the draw-bars in their proper places in the center of the cars at the time he sustained the alleged injury.

5th. That he state more definitely and certainly wherein the draw-bars on the cars failed to work properly when they came together.

6th. That he state more definitely and certainly what he was doing at the time of the alleged injury.

7th. That he state definitely and certainly where he was, whether standing on the track or riding on the cars, at the time of the alleged injury.

12 8th. If plaintiff at the time of the alleged injury had his foot against the draw-bar of one of the cars mentioned in said amended petition, that he state definitely and certainly which draw-bar it was, whether the one on the standing car or on the moving car; and that he further state definitely whether he permitted his foot to remain on said draw-bar until the cars came together.

9th. That he state more definitely and certainly wherein said defendant was negligent and careless in the operation of its cars, tracks, switches, side-tracks, draw-bars and couplings.

10th. That he state more definitely and certainly the manner in

which he sustained the injuries complained of in said amended petition.

Defendant states that the information herein requested is necessary for the proper preparation of its defence in this action.

DAVID SMYTH,
J. H. RICHARDS,
C. E. BENTON,
Attorneys for Defendant.

No. 21554. Brinkmeier vs. The Mo. Pac. Ry. Co. Motion to make amended petition more definite.

Filed Dec. 21, 1901.
FRED F. WILLIAMS, *Clerk.*
GRANT KNEPPLE, *Deputy.*

13 In the District Court within and for Sedgwick County (the Eighteenth Judicial District of the State of Kansas), — Day January Term, A. D. 1902.

Cause No. 21554.

HENRY BRINKMEIER, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, a Corporation, Defendant.

Journal Entry Overruling Motion.

Now, to-wit, on this 11th day of January, A. D. 1902, the same being a regular day of the January term, A. D. 1902 of said court, this cause came on for hearing upon the motion of the defendant herein to the amended petition of the plaintiff, plaintiff being present by his attorney, C. V. Ferguson, and defendants not being present by its attorneys nor in person and the court after hearing arguments of counsel, and being fully advised in the premises, finds that the motion of the said defendant to the amended petition should be overruled.

It is therefore by the court considered ordered and adjudged that the said motion of the said defendant to the amended petition be, and the same is hereby overruled.

Defendant given twenty days from this date to answer without prejudice to the trial of this cause at this term of this court.

D. M. DALE, *Judge.*

O. K.
C. V. FERGUSON.

No. 21554. Journal Entry. Brinkmeier, Plaintiff, vs. Mo. Pac. Ry. Co., Defendant.

Filed January 11th, 1902.
FRED T. WILLIAMS, *Clerk.*
GRANT KNEPPLE, *Deputy.*

14 In the District Court of Sedgwick County, Kansas.

No. 21554.

HENRY BRINKMEIER, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, a Corporation, Defendant.

Answer.

Now comes said defendant and for answer to the amended petition filed herein says:

First. That it denies generally and specifically each and every allegation therein contained.

Second. Further answering said defendant says, that the injuries and damages claimed to have been sustained by said plaintiff, if any were sustained, were caused by the carelessness and negligence of said plaintiff and without fault on the part of this defendant.

Wherefore defendant prays judgment for costs.

D. SMYTH,
J. H. RICHARDS,
C. E. BENTON,
Attorneys for Defendant.

No. 21554. Henry Brinkmeier v. Mo. Pac. Ry. Co. Answer.

Filed Jan. 27th, 1902.
FRED F. WILLIAMS, *Clerk*,
GRANT KNEPPLE, *Deputy*.

15 In the District Court of Sedgwick County, Kansas.

#21554.

HENRY BRINKMEIER, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, a Corporation, Defendant.

Entry.

Plaintiff appearing by his attorney, C. V. Ferguson, moves the court for leave to file a reply in the above entitled cause to that portion of the defendant's answer designated as second and the court being advised in the premises finds that said motion and request ought to be and the same is hereby granted, plaintiff to file said reply instanter without prejudice to the trial of said cause at this term of this court and without prejudice to the defendant to have this

cause continued if it shall so desire by reason of the filing of said reply.

D. M. DALE, *Judge.*

21554. Brinkmeier v. Mo. Pac. Ry. Co. Leave to file reply.

Filed Jun- 2, 1902.

FRED F. WILLIAMS, *Clerk.*
GRANT KNEPPLE, *Deputy.*

16 In the District Court of Sedgwick County, Kansas.

No. 21554.

HENRY BRINKMEIER, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, a Corporation, Defendant.

Reply.

Now comes the plaintiff and for reply to the portion of the answer of the defendant designated as second filed herein *and* says:

That he denies generally and specifically, each and every statement and allegation contained in said answer designated as second.

Wherefore, Plaintiff prays judgment as in his petition and for his costs.

C. V. FERGUSON,
Attorney for Plaintiff.

21554. Brinkmeier, Plff. vs. Mo. Pacific Ry. Co., Deft. Reply.

Filed Jun- 2, 1902.

FRED F. WILLIAMS, *Clerk.*
GRANT KNEPPLE, *Deputy.*

17 In the District Court of Sedgwick County, Kansas.

No. 21554.

HENRY BRINKMEIER, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Before Hon. Thomas C. Wilson, Judge.

Appearances:

For plaintiff: C. V. Ferguson and Kos Harris.
For defendant: C. E. Benton and Smyth & Helm.

Charles D. Fazel, Official Stenographer.

(Damages.)

Trial Commenced July 8th, 1908, at 9:00 a. m.

And now, to-wit on this 8th day of July, 1908, the same being one of the regular judicial days of the April, 1908, term of the District Court of Sedgwick County, Kansas, this cause came regularly on for trial, the plaintiff appearing in person and by his attorneys, C. V. Ferguson and Kos Harris, and the defendant appearing by its attorney- C. E. Benton and Smyth & Helm, and thereupon both parties announced themselves ready for trial. Both parties waive trial by Jury and agree to submit this cause for trial before the court without the intervention of a jury to which the court assents and on oral consent of both parties in open court it is so ordered and entered on the court's journal.

18 And thereupon witnesses were sworn to testify in the case, and the following proceedings were had.

COURT: The plaintiff may call his first witness.

Mr. FERGUSON: Plaintiff offers in evidence Stipulation in this case, entered into on the 19th day of January, 1905, filed in this case on the same day, as follows:

Mr. BENTON: Defendant objects to this as incompetent, irrelevant and immaterial under the pleadings in this case.

COURT: This is the same stipulation entered before?

Mr. FERGUSON: Yes, sir.

By the COURT: The objection will be overruled, to which ruling of the court defendant excepts.

Stipulation read in evidence by Mr. Ferguson, for plaintiff, copy hereto attached marked "Ex. A."

HENRY BRINKMEIER, plaintiff, called as a witness in his own behalf, having been sworn, testifies as follows:

Examination in chief by Mr. FERGUSON:

Q. State your name to the court?
A. Henry Brinkmeier.
Q. Are you the plaintiff in this case, Mr. Brinkmeier?
A. Yes, sir.
Q. What was your business for the last 16 or 17 years?
A. Railroading.
Q. Where were you employed? What railroad companies?
A. Santa Fe and Missouri Pacific.
Q. In what capacity did you work?
A. Section hand, fireman, brakeman and conductor.
Q. When did you go to work as conductor, for what company?
A. Worked as conductor for the Santa Fe, November, 1897.
Q. Worked for that railroad company until some years afterwards?
A. For more than a year.
Q. When did you first commence working with the Missouri Pacific?
A. September 1st, 1899.
19 Q. Where were you living at that time, Mr. Brinkmeier?
A. Wichita.
Q. Well, in what capacity did you go to work for the Missouri Pacific?
A. As brakeman and conductor.
Q. What salary did you draw while working as brakeman and conductor respectively?
A. $60 to $65 as brakeman, $90 to $95 as conductor?
Q. Did you draw anything for overtime?
A. Yes, sir.
Q. How much did you draw for overtime when working as brakeman?
A. 20 cents an hour.
Q. How much when working as conductor?
A. 30 cents an hour.
Q. That is for overtime after serving how many hours?
A. Ten hours.
Q. Then your salary was from $65.00 to $95.00, depending upon the amount of overtime?
A. Yes, sir.
Q. From what point to what point were you running, while working for the Missouri Pacific?
A. Wichita and Hutchinson.
Q. Would you go from Wichita to Hutchinson and back the same day?
A. Yes, sir.
Q. Did you receive an injury while working for this company?
A. Yes, sir.
Q. When?

A. The 12th day of November, 1900.
Q. Where did it occur?
A. Hutchinson, Kansas.
Q. Who were the other employees who helped operate this train from here to Hutchinson, that day?
A. Waltman, conductor; Murray, engineer; Walty, fireman, and Jud Shives, partner brakeman.
Q. Whereabouts in Hutchinson did this accident occur?
A. Southeast part of town.
Q. How many tracks at the point where the accident occurred?
A. Two.
20 Q. What direction did they run in?
A. East and west.
Q. Where did this accident occur? On the switch or on the main line?
A. On the side track.
Q. Which side of the main line is this side track on?
A. On the north side.
Q. Where had you come from, if anywhere, there in Hutchinson, just before this accident?
A. Southeast part of town, from the Salt Works.
Q. What had you been at the salt works for?
A. To get cars.
Q. Well where did you take the cars you got at the salt works?
A. Placed them on the side track.
Q. Where were they going?
A. Placed on the side track, to make up the train.
Q. Where were the cars you were working with when the accident occurred; were they in on the side track, as you call it?
A. Coming in on the side track.
Q. How many cars were you bringing in on the side track?
A. Three or four.
Q. Were these cars coming in off the main line?
A. Yes, sir.
Q. Which way were these cars being handled; east or west?
A. They were moving west.
Q. Were these cars you had brought over from the salt works to be coupled with other cars down on this side track?
A. Yes, sir.
Q. Where were these cars standing on the side track; with reference to where you came in off of the main line?
A. Six or seven car lengths, about, from the switch.
Q. That would be west of the switch?
A. Yes, sir.
Q. As these cars came off the main line to the side track, where was you?
A. On top of the cars.
Q. Anybody else with you?
A. No, sir.
21 Q. How many cars were there standing in on this side track at that time?

A. Several of them. I don't know how many.

Q. In what capacity were you working at that time; conductor or brakeman?

A. As brakeman.

Q. What were the duties of a brakeman, Mr. Brinkmeier?

A. Setting and releasing brakes; coupling and uncoupling cars, loading and unloading merchandise at stations, anything to help and assist to run the train.

Q. Does this train crew that runs to Hutchinson from Wichita, do the switching there at Hutchinson?

A. Yes, sir.

Q. Had these cars been kicked in there off the main line to the switch by the engine?

A. Yes, sir.

Q. As these cars were brought off the main line on to this switch track, what, if anything, did you do with the brakes?

A. Set the brakes and released them, in order that the cars should run down to the cars standing still to couple.

Q. How fast were these cars going as they came in on the side track?

A. About as fast as a man can walk.

Q. For what reason or purpose did you release these brakes as these cars were coming in on this side track?

A. So they would run down to the standing still cars to couple.

Q. When you released these brakes, what did you do then?

A. Got off the west car, at the east end on the south side.

Q. When you got down on the ground, what did you do, or where did you go?

A. Went forward, west of the head end of the car.

Q. What was the numbers and letter on that car, Mr. Brinkmeier?

A. 17555 Missouri Pacific Salt Car.

22 Q. What kind of a car was that; box car or flat car?

A. Salt car. Similar to a box car.

Q. Closed car, is it?

A. Yes, sir.

Q. When you went around to the head of this car, westward, for what purpose did you go there?

A. To see the condition of the couplers.

Q. State in what condition you found the couplers of this draw-bar on this moving car when you went there?

A. I found the knuckle closed, and the draw-bar lopped over to one side towards me and from the center of the car.

Q. You see this model sitting here in front of you: I will ask you if this portion attached to this model that swings on a hinge that I am unable to open, is that the part you refer to as the knuckle?

(Shows by opening and closing knuckle of model.)

A. Yes, sir.

Q. This attachment to this model that I now indicate here, that is what you call the coupling, is it?

A. Yes, sir.
Q. Attached to the body of the car?
A. Yes, sir.
Q. And the forward part of it, that seems to be able to swing, is what you call the knuckle?
A. Yes, sir.
Q. What did you do with that coupling when you went around there?
A. I found the knuckle closed.
Q. Did you attempt to open it?
A. And I attempted to open the knuckle.
Q. What did you do?
A. Failed to open the knuckle. I pushed the coupler over to the center of the car.
Q. Well, did you take hold of the rods that are here, for the purpose of releasing the fastenings and open this coupling?
A. Yes, sir.
Q. State where this rod that runs from the side of the car in to the coupler, where is it attached to the car?
A. It was attached on the end of the car.
23 Q. Was it under the car like this one, or up on the side of the car?
A. Up on the end of the car?
Q. Did you take hold of that?
A. Yes, sir.
Q. Did the fastening that holds the knuckle in there release?
A. No, sir.
Q. What, if anything did you do then?
A. I went forward to the standing still car.
Q. I will ask you if these couplers are designed to work automatically?
A. Yes, sir, they are.
Q. That is, they are what is called automatic couplers?
A. Yes, sir.
Q. Where are these couplers placed on cars, as to being in the center, or otherwise, of the cars?
A. The couplers are placed underneath the car and in the center of the car.
Q. Will these couplers couple when brought together, unless in the center of the car?
A. No, sir.
Q. What was the name of the coupler on the moving car, if you know?
A. Tower coupler.
Q. What kind of coupler on the standing car, to which you were going to couple, if you know?
A. Hein.
Q. You say you pushed this draw bar over to the center of the car?
A. Yes, sir.
Q. Which way did you push it; from the side you had come from?
A. Yes, sir.

Q. It was over then, towards you?
A. Yes, sir. Over towards me and I pushed it over toward the center of the car with my hand.
Q. What did it do?
A. It came back.
Q. Then you went forward?
A. Yes, sir.
Q. What kind of car was this that was standing on the side-track, that you went to; flat car, or box car?
A. Box car off the Central Branch. A system car, off the Central Branch.
24 Q. When these couplers are about to be used, in what position is it necessary to place them so they will couple, as to whether the knuckle is open or closed?
A. One knuckle must be open in order for cars to couple automatically.
Q. Do they couple with one open?
A. Yes, sir.
Q. When you were attempting to open the knuckle on the moving car, how far apart were the moving cars?
A. About one car length.
Q. When you went to the standing car you say you opened the knuckle of that car?
A. Yes, sir.
Q. After you opened this knuckle on the standing car, what did you do?
A. I took hold of the hand hold on the end of the standing car.
Q. Where was this moving car at that time?
A. About a half car length away.
Q. Coming towards you?
A. Yes, sir.
Q. What did you do with the coupler on the moving car, if anything, as they were about to come together?
A. I placed my foot against the coupler of the moving car and placed it to the center of the car, so that it would couple.
Q. Did the coupling make when these cars came together?
A. No, sir.
Q. What happened to these couplers?
A. The knuckle of the standing still car closed, and the coupler of the moving car "past" the coupler of the standing still car away from me.
Q. Where did the draw bar and knuckle that was closed on this moving car finally stop on the standing car, or the coupler on the standing car?
A. Over to one side from me.
25 Q. Did it slip by?
A. Yes, sir.
Q. The coupler on the standing car?
A. Yes, sir.
Q. Where was your foot caught? State if your foot was caught in these couplers?

A. Yes, sir.

Q. Where was your foot in these couplers. What part was it between?

A. It was between the lip of the draw bar and the outer edge of the knuckle of the standing car.

Q. You mean by the lip that part of the coupler you had put your foot against?

A. Yes, sir.

Q. What you mean by the lip is this portion?

A. Yes, sir.

Q. Did you see anything about this coupler before it came together that indicated that it would not couple when coupled up?

DEFENDANT'S COUNSEL: That is objected to as a leading question.

COURT: That is pretty suggestive. The objection will be sustained, to which ruling of the court plaintiff excepts.

Q. Did this draw-bar, I mean the draw-bar on the standing car pass the draw-bar on the standing car to you, or from you, did you say?

A. The coupler on the moving car passed the coupler on the standing still car over from me.

Q. Show the court with this model where your foot was caught and where the coupler of the moving car finally stopped against this coupler of the standing still car?

DEFENDANT'S COUNSEL: Would you use these cars, so we will both use the same cars?

PLAINTIFF'S COUNSEL: I have never been able to see that your couplers were made in proportion—They are out of proportion, I believe to the coupler used; but still, we will try it at present.

DEFENDANT'S COUNSEL: You have only got one car there.

26 Q. Take this pencil and indicate just where your foot was caught, between what points, or pieces of this coupler, and show the court how the knuckle, as you stated, on the moving car was closed?

A. The knuckle on the standing car closed. I had opened it and the coupling of the moving car passed that of the standing still car, over from me and my foot was caught between this part, as I said, the lip of the coupler, and this part here of the standing still car. (Indicates on model.)

Q. You mean the inside of the face of the knuckle that had closed on the standing still car?

A. Yes, sir.

Q. Take these two cars that appear to have automatic couplers, and show the court what position they occupied when they stopped, and where your foot was, if you can?

A. (Shows with models.) As these cars came together, this knuckle closed, and this moving car passed this coupler of the standing still car over in this position; over here, and my foot between this point there, and this point here.

Q. Like that?

A. Between this point here, and this point here (Shows) on the standing still car. They were standing in this position, with my foot in between. (Shows.)

Q. Was there a hand hold on the end of the car standing still, that you took hold of?

A. Yes, sir.

Q. How far was it from the ground?

A. I do not know. It was easily reached.

Q. Was it, do you remember, near the bottom, like on this model, or higher up?

A. I do not remember. It was on the end of the car.

(Witness lays aside model and resumes witness chair.)

Q. Had you frequently, previous to this time, in handling these automatic couplers, seen them from the center of the cars, as this was?

A. Yes, sir.

Q. What time of the day did this accident occur?

A. About 3:30 in the afternoon.

27 Q. When you find couplers in the condition that these was, over from the center, as you say, when you first got down off the moving car; what would you do with the couplers?

DEFENDANT'S COUNSEL: I object to that as incompetent, irrelevant and immaterial.

COURT: The objection will be overruled, to which ruling of the Court defendant excepts.

Q. Answer

A. I would assist the coupler.

Q. How did you assist the coupler?

A. With my hand, or foot; which ever is most convenient.

Q. Where did you assist them to, or from?

DEFENDANT'S COUNSEL: I object as incompetent and immaterial.

COURT: The objection is overruled, to which ruling of the Court defendant excepts.

A. Place my foot or hand against the coupler and shoved it over to the center of the car.

Q. Did the defendant company ever issue any instructions or rules to you about how you should adjust automatic couplers when not in centers of cars?

A. No, sir.

DEFENDANT'S COUNSEL: I object to that as immaterial.

COURT: Probably at this time it is immaterial.

PLAINTIFF'S COUNSEL: I think not, your Honor.

COURT: Are you not anticipating a possible defense?

PLAINTIFF'S COUNSEL: Oh, no. This would only tend to show whether or not that which he was doing was a thing that was left to his discretion and judgment, or whether he was violating—if he had instructions, of course.

COURT: No claim that he did not comply with the instructions or rules.

PLAINTIFF'S COUNSEL: No. We want to show they haven't given any, therefore could not be violating them; therefore, we are entitled to show what the facts were. He knows that what he did was a reasonable thing, under the circumstances.

28 COURT: I will sustain the objection, to which ruling of the Court plaintiff excepts.

DEFENDANT'S COUNSEL: I will ask that the answer be stricken out.

COURT: The motion will be sustained, and the answer will be stricken out. Put your next. To which ruling of the Court plaintiff excepts.

Q. Did the company at any time ever issue any rules, or give you any instructions describing how coupling cars, whose draw-bars were slightly out of line, should be handled?

DEFENDANT'S COUNSEL: That is objected to as incompetent and immaterial.

COURT: The objection will be sustained. To which ruling of the Court plaintiff excepts.

Q. Was your foot caught between these couplers?
A. Yes, sir.
Q. How long was your foot caught there?
A. Long enough for the cars to release.
Q. Did the cars separate?
A. Yes, sir.
Q. About how far did they separate?
A. About a foot.
Q. You were standing with your foot pinioned in there while they remained together there?
A. Yes, sir.
Q. When these cars separated, your foot was released?
A. Yes, sir.
Q. What did you do then, if anything?
A. I hopped out and sat down upon the cinders of the track, between the two tracks.
Q. Where was the conductor at that time?
A. At the switch.
Q. How far away from you was that?
A. Five or six car lengths or more.
Q. You mean the switch where the side track comes in?
A. Yes, sir. Five or six cars or more.
Q. Where was the engineer at that time?

29 A. Still further east on the main line.
Q. Where were you taken to, after this, if any place?
A. To a house south of the tracks; opposite to where I was injured.
Q. How long did you stay there?
A. I do not know.
Q. Well, where were you taken from there, if anywhere?
A. Wichita Hospital, Wichita.
Q. Describe to the Court the condition that foot was in when you took it out from between those couplers?
A. My right foot was cut—this is my left foot, of course—my right foot was cut right across here.

DEFENDANT'S COUNSEL: We will ask him to state that in words.

PLAINTIFF'S COUNSEL: Well, I will get to it.

Q. You indicated with your pencil that your foot was injured, involving the great toe on the inside, proceeding backward and diagonally across the bridge of your foot toward and near the heel, is that correct?

A. No. Not near the heel.

Q. Well, near the instep?

A. The instep; yes, sir.

Q. Was it broken or mashed

A. Yes, sir. Broken right across there, and it was open right across here, a little way across the bridge of my foot; had burst open.

Q. Any bone protruding from this wound?

A. I think that the doctor at Hutchinson; I do not know his name, picked a splinter out of the big toe, of bone.

Q. Splinter of bone out of the big toe?

A. Yes, sir, out of the end.

Q. Was this foot amputated after that?

A. Yes, sir.

Q. When?

A. On the 15th of November following.

Q. Where was this made? What hospital?

A. Wichita Hospital, Wichita.

Q. What surgeon waited on you, Mr. Brinkmeier?

DEFENDANT'S COUNSEL: That is objected to as incompetent, irrelevant and immaterial.

A. Dr. Oldham.

COURT: I presume it is immaterial.

Pl'ff excepts.

Q. Did Dr. Oldham advise you of the necessity of the amputation of this foot?

A. Yes, sir.

Q. How long did you remain in the hospital?

A. From the 12th of November until a day or two before Christmas.

Q. Did you go back to the hospital after that for treatment?

A. Went back to the hospital up until the 27th or 28th of January, for treatment, every other day.

Q. Did your limb heal up after this amputation?

A. No. sir.

Q. Did you receive treatment from any doctors during the interval occurring after that operation?

A. Yes, sir.

Q. Who treated you?

A. Dr. Gould and Dr. Harris at Kiowa, Dr. Spideler at Wellington, Kansas, and Dr. Basham at Wichita, Kansas.

Q. You consulted with and were treated by these physicians to effect a healing and cure of this limb?

A. Yes, sir.

Q. Who assisted, if anybody, in its care and treatment, other than these physicians, if any one?

A. My wife dressed my limb, outside of these doctors.

Q. Did Dr. Basham advise you of the necessity of a second amputation?

A. Yes, sir, to effect a cure; yes, sir.

Q. Did it ever heal after the first amputation?

A. No, sir.

Q. You say that Dr. Basham did advise you that it would be necessary to operate?

A. Yes, sir.

Q. Did he operate on it?

A. Yes, sir.

Q. How long was this after the first operation?

A. About two years and three months.

31 Q. Where on your limb now, if any place, from the first to the second amputation, if it did not heal, was it that it did not heal?

A. Didn't heal on the end of the stump and I had boils and sores on my limb here, more or less all the time.

Q. Was this sore on the end of your limb where it was amputated, there constantly?

A. Yes, sir.

Q. What was the condition of this limb from the first amputation until amputated the second time, as to whether or not you suffered any pain or inconvenience from it?

A. Had running sore on the end all the time and boils and sores from the boils, more or less all the time, on my limb.

Q. Did you try to wear an artificial limb any time?

A. Yes, sir.

Q. Did you succeed?

A. No, sir.

Q. Did you suffer any inconvenience from pain, from loss of sleep, during that time?

A. Yes, sir, I did. I was very nervous all the time; got but very little sleep; suffered all the time.

Q. Did this limb heal after the second operation?

A. Yes, sir.

Q. Have you suffered any atrophy of this limb, that is, growing smaller since the operation?

A. Yes, sir. Growing smaller and weaker all the time.

Q. State the condition of that limb at this time, as to its having shrunk—less in size and grown weaker?

A. It is shrunken in size and it is growing weaker.

Q. Does it continue to grow weaker at this time?

A. Yes, sir.

Q. You wear an artificial limb part of the time?

A. I wear an artificial limb when I am able to wear it. Not wearing it to-day on account of a boil, I have on here.

32 Q. Are you suffering any inconvenience or pain from the use of this artificial limb?

A. Yes, sir, all the time.

Q. What seems to be the trouble?

A. Seems as though my limb don't get accustomed to the wearing of an artificial limb. Sores gaulled on my limb all the time, very near all the time; have no rest whatever out of it. I do not take a step but what I am in misery a little bit, all the time.

Q. Where was the first amputation—that is how far below the knee?

A. I had an eleven inch stump the first time below the knee.

Q. How much was removed on the second operation?

A. About four inches. I have about seven inch stump now left below the knee.

Q. How much have you expended for doctor bills and surgeon bills for treatment of this limb, hospital, etc.?

A. I do not know the exact amount. $125.00 or more.

Q. Have you kept an accurate account of it?

A. No, I haven't.

Q. How old were you when you commenced working for the railroad. That is, commenced railroading?

A. Seventeen years old.

Q. What year was that?

A. 1886.

Q. Have you any other occupation or business, other than railroading.

A. No, sir.

Q. How old were you at the time of this accident, Mr. Brinkmeier?

A. 32.

Q. Then you are 37, or a little better now?

A. Yes, sir.

Q. Were you employed continuously from 1886 down to the time of this accident, in railroad service?

A. Yes, sir.

Q. In that business, did you work Sundays?

A. Worked any time, day or night, Sundays or any other
33 day.

Q. About how long had you been using automatic couplers?

A. Ever since they came in use.

Q. When was that, if you know. What years?

A. I would not know just what years they came in use.

Q. I will ask you if they did not come into considerable use in the year- 1898 and 1899?

A. Yes, sir. They was.

Q. On what roads did you use these automatic couplers during these years?

A. Santa Fe and Missouri Pacific.

Q. What was the state of your health during these years?

A. My health was good.

Q. Your services during this time was continuous?

A. Yes, sir.

Q. Would these couplers have made, when these cars were brought together, if they were not in the center, on the moving car?

A. No, sir.

Q. You walked along in front of this moving car, did you, as you were attempting to open the coupler?

A. Yes, sir.

Q. How were you proceeding, backwards, or sideways?

A. Walking sideways.

Q. That knuckle you say was closed?

A. On the moving car?

Q. Yes, sir.

A. Yes, sir.

Q. Where were you standing when you opened the knuckle on the moving car—I mean on the standing car?

A. On the outside of the track—of the rail.

Q. You say the cars did not couple when they came together?

A. No, sir.

Q. What, if anything, were you looking at, when you was trying to make this coupling?

A. I was looking at the couplers—the condition of them.

Q. Were you trying to do anything else during that time?

A. No, sir.

34 Q. From the time you got down off this car, until your foot was caught between the couplers, were you doing anything else than working with this coupler?

A. No, sir. I looked at the couplers and thought of nothing else but to make this coupling.

Q. What has been the extent of your education prior to this accident?

A. To read and write and figure a little bit.

Q. You have attended school some since this?

A. Yes, sir.

Q. How soon, if at any time after this accident, did you first receive employment?

A. I did not receive any employment whatever until last summer; a year ago this summer; I wrote policy for three or four months.

Q. Do you find any inconvenience or pain from attempting to use your artificial limb—going about your affairs, at this time?

A. Yes, sir.

Q. How does it effect your sleep if it affects it?

A. I wear the artificial limb; my limb gets irritated and sore and tired and worn out, and I do not get any sleep until my limb rests first. I lay in bed two or three hours before I get to sleep, on account of my limb.

Q. Does it ever swell, when you are trying to wear the artificial limb?

A. Yes, sir, it does.

Q. What do you experience then?

A. I am in misery then; because it is swelled, irritated and inflamed; and gets so tight, my artificial limb that I have to pull it off and rest my limb before I can wear it again, and the hide peals off my limb, from being irritated or inflamed.

Q. Have to quit work?

A. Yes, sir. I cannot work during that.

Q. How much smaller is that limb now than when it was amputated, if any?

A. Five or six inches.

35 Q. Just show the court here the stump of that limb, and what condition it is in at this time? (Shows.)

A. It is swollen now around here, on account of this boil; that is why I am not wearing this limb. It is swollen up here not less than three-quarters of an inch. It is swollen more now too, from not having the limb on.

Q. When you have worn the limb awhile and take it off, does it apparently enlarge?

A. Yes, sir. Circulation gets in there and it enlarges. I could not wear the limb this morning on account of this boil. This does not fit my limb, the condition it is in, when in ordinary good shape.

Q. Had you had this artificial limb diminished from time to time, to fit the limb?

A. Yes, sir.

Q. How many times has that been done?

A. Two times.

Q. How much has it been shortened?

A. The straps have been shortened up three or four inches; and I have newspapers in between the leathers here to fill out with, now, on account of being too large. I wear an extra leather strap from here to here, in the artificial limb.

And thereupon the hour of 12:00 o'clock having arrived, court was adjourned to 1:30 P. M.

And thereupon the hour of 1:30 having arrived court convened pursuant to adjournment, all the parties present as before, and thereupon the following proceedings were had:

Cross-examination of HENRY BRINKMEIER, plaintiff.

By Mr. BENTON for defendant.

Q. Mr. Brinkmeier, what is your business now?

A. I am working at the Western Furniture Factory, what time I am able to work.

Q. What time have you been working there?

A. Some time in June, I went to work.

Q. Since last June?

A. Yes, sir.

Q. What is the nature of your work?

36 A. Working in the cabinet shop.

Q. Assisting in making or repairing furniture?

A. Making furniture—assisting in making furniture.

Q. Making furniture?

A. Yes sir.

Q. What business were you engaged in before that, since the accident?

A. I wrote policy three or four months before that; a year ago this summer.

Q. What is that?

A. It is kind of similar, as near as I can tell, to the Louisiana Lottery.

Q. What other business have you been engaged in?

A. That is all.

Q. Were you residing in the Territory awhile?

A. Yes, sir. I was in the Territory; stopping there with my relation.

Q. Were you on a farm?

A. No sir, I was not farming; I was out on a farm where my folks live.

Q. You have worn an artificial limb most of the time?

A. Yes sir. I wear an artificial limb what time I am able to wear it.

Q. You wear it most of the time, don't you?

A. I wear it five or six days out of the week, I presume, what time I am able to get around. Yes sir.

Q. Did you wear it yesterday?

A. Yes sir. I wore it yesterday.

Q. Been wearing it right along until yesterday?

A. Been wearing it right along whenever my limb permits me to wear it.

Q. Answer the question, been wearing it right along up until yesterday?

37 A. Been wearing it right along whenever my limb permits me to wear it; and wear it a good deal when I ought to be at home resting.

Q. Have you been wearing it for several weeks, up until yesterday?

A. Yes sir, five or six days out of the week. Yes sir.

Q. You wore an artificial limb up until the day of the trial?

A. When able to wear it.

Q. Didn't you wear it up to that time; up to the day of the trial?

A. I do not remember. I wear it whenever I am able to wear it.

Q. Have you been working on a merry-go-round or something of that kind?

A. Yes sir. I had forgotten that. I was with a friend of mine about a month, helping him along, a little bit.

Q. How long have you been living here, since you came back from the Territory; when did you come back from the Territory to live here?

A. We went to housekeeping this last time the latter part of July.

Q. Was that when you moved back from the Territory?

A. Didn't move back; furniture here all the time. Got a little work to do so we went to housekeeping.

Q. You came back here to stay?

A. Yes sir.

Q. You have been working on railroads; or had been for a good many years prior to this accident?

A. Yes sir.

Q. Part of the time as brakeman, and part of the time you say you acted as conductor?

A. Yes sir, and part of the time as section hand, and part of the time fireman.

Q. You were not conductor on the Missouri Pacific?

A. Yes sir. I have run trains on the Missouri Pacific.

38 Q. You were called in as extra sometimes, were you not? You were not regular conductor?

A. I was extra conductor. Yes sir.

Q. That is a brakeman that is called on some times to take out a train as conductor?

A. I was extra conductor?

Q. Is that what an extra conductor is?

A. Yes sir. As near as I can tell it. I was called to the office and passed an examination on the Missouri Pacific, for conductor.

Q. Your work was the work of a brakeman; that is regular work?

A. Brakeman or running train; whatever they called me for.

Q. How long had you been working as a brakeman for the Missouri Pacific; on the Missouri Pacific?

A. I do not know the exact time. I broke for five months; four or five months, I guess before they called me up for examination for running train; after that I was running train and breaking.

Q. After that you were running train and breaking?

A. Yes sir.

Q. A man acts as conductor or brakeman both?

A. Whatever they call me for. When they call as brakeman, and when they call me as conductor, go as conductor.

Q. Working then both as brakeman and conductor; not in the regular employ?

A. I was employed as brakeman and conductor. A while after I went to running train. Before that I was brakeman all the time.

Q. Well, what were you doing at the time of the injury?

A. I was braking at that time.

Q. You were braking?

A. Yes sir.

Q. Had been for some time prior to that?

A. I guess I had been breaking just before my injury about a month and a half, or somewheres along there, on that run I was injured on.

39 Q. Been braking on some other run too, hadn't you?

A. Yes sir.

Q. But had been going to Hutchinson for some time?

A. Yes, sir a month and a half, somewheres along there.

Q. Judge Shives was the other brakeman?

A. Yes sir.

Q. He is dead?

A. Yes sir.

Q. But Mr. — what was the conductor's name,—Waltman?

A. Yes sir, Waltman.

Q. He is not here now?

A. No sir.

Q. Any other; Shives or Waltman was present when the accident occurred?
A. Not right present where I was at; no sir.
Q. Not where they could see you?
A. No sir.
Q. The engineer and fireman were not present when the accident occurred?
A. Not right where I was at. They were out there—out on the engine.
Q. In some other part of the yard?
A. Out on the main line; yes sir.
Q. You rode some of these cars in on the side tracks?
A. Yes sir.
Q. And this salt car which has been referred to, Missouri Pacific 17555, was one of the cars?
A. Yes sir.
Q. You came from the east, did you, from the east end of the side track?
A. From the southeast part of town; from the salt works.
Q. Coming in on to the track, you came on the east end of the side tracks?
A. Yes sir.
Q. And these cars were moving west?
A. Yes sir.
Q. The side track extended east and west?
A. Yes sir.
Q. The cars that you were bringing in were coupled together, were they.
A. The three or four cars were coupled together, yes sir.
Q. And one of the cars standing on the side track?
A. I do not know how many. Several of them.
40 Q. Were they coupled together?
A. I don't know whether they were all coupled together or not.
Q. You did not know, as the brakeman, what was going to be done with this salt car?
A. Place them on the side track to make up the train we were switching.
Q. You were switching, but you did not know what cars you were going to take out?
A. The conductor had the switch list.
Q. He was the one that controlled that?
A. Yes sir.
Q. You had not been told to make this coupling?
A. Not by the conductor.
Q. Had not been told by any one, had you?
A. No sir; just performing regular duties.
Q. Just answer this question, please. No one was there at the time, but you?
A. That is all.

Q. When you got off these cars and went around, you went around to the west end of the salt car, which was the moving car?
A. Yes, sir.
Q. The other cars were coming with it, coupled to it?
A. Yes, sir.
Q. You say you went around for the purpose of—Went around to see the condition of the coupler?
A. Yes, sir.
Q. Had this car been brought from the salt works?
A. Yes, sir.
Q. Up there some where?
Q. Had other cars been brought from up there?
A. Yes, sir.
Q. You were switching up there too?
A. Yes, sir.
Q. Had been?
A. Yes sir. Switching all over the Missouri Pacific tracks at Hutchinson.
Q. There were other tracks up at the salt works, were there, where you had done switching?
A. Yes, sir.
Q. Had you handled this car before you came down on this track?
A. I do not know.
41 Q. Had you coupled or uncoupled it up there, from any other cars?
A. I don't know.
Q. You may have?
A. I may have.
Q. Were you with these cars from the time the engine got them up there, until they were put on the side track?
A. Yes sir.
Q. When you came around to the west end of the moving salt car, you say that you saw that the coupler—drawhead—was over to one side?
A. I found the knuckle closed.
Q. Well, did you find the coupler over on one side?
A. Lopped over to one side, and from the center of the car towards me.
Q. How far was it from the center of the car?
A. I do not know just exactly how far.
Q. About how far, if you noticed it?
A. An inch and a half, or two inches; something like that. That is, over towards me; just lopped over.
Q. That is to the south side?
A. Yes, sir.
Q. You went on the other side of the coupler, did you?
A. I went on the other side; trying to open the knuckle. Took hold of the pin lever—pin elevator.
Q. That is, you came over on the north side of the salt car?
A. Yes, sir.
Q. And the pin elevator was on that side, was it?
A. Yes, sir.

Q. That is the bar that runs from the—that is attached to the pin and runs out to the side of the car, that you can take hold of, from the north side of the car?

A. Yes, sir.

Q. How long did you remain on the north side of the car?

A. Did not remain there any longer than to take hold of the pin elevator and try to lift the knuckle.

Q. Had you done anything with the knuckle before you tried to raise the pin?

A. No, sir.

Q. Hadn't you pushed the coupler over?

A. No, sir.

Q. You were on both sides of the coupler?

A. On the north side just long enough to raise the lever of the pin elevator.

42 Q. Did you notice when on the north side, that the coupler was over to the south a little of the center?

A. I do not know. I did not notice before I went over there.

Q. When did you notice that?

A. As I went to the head end of the car.

Q. Did you try to push it over then?

A. No sir; went there to open the knuckle of that coupler.

Q. You went to see the condition of the coupler?

A. Wanted to open the knuckle of the coupler. That is what I done.

Q. You testified you went around to see the condition of the coupler; did you go around to see the condition of it?

A. Seen it from this side; lopped over towards me from the center of the car.

Q. What do you mean by lopped over?

A. It was lopped over in the carrier irons, in there, as near as I can tell.

Q. That is, not in the center?

A. No, sir.

Q. You mean a little to the south of the center?

A. Yes, sir. It was.

Q. That is what you mean by that?

A. Yes sir. And it was lopped over—twisted a little bit.

Q. Twisted, was it?

A. Yes, sir; just lopped over.

Q. Did you straighten it up?

A. I just pushed it over to the center of the car?

Q. Did you get it straightened up?

A. I pushed it to the center of the car.

Q. That is not the question, did you get it straightened up?

A. I pushed it to the center of the car, but it did not remain there. It came back to where I found it.

Q. That is not the question, I asked if it straightened up?

A. I pushed it to the center of the car, but it did not remain there where I put it, but came back where I found it.

COURT: Answer the question: Did you succeed in straightening it up. You did or did not. Answer that question.

43 A. I pushed it over to the center of the car——

COURT: Did you succeed in straightening it up?

PLAINTIFF'S COUNSEL: Wants to know about the lopped over condition of it?

A. It apparently straightened up as I shoved it to the center of the car.

Q. Was it straightened up when it came back, or was it still twisted?

A. It was still lopped over and came to the position I found it in.

Q. That is, came back to the south side?

A. Yes, sir.

Q. And was still twisted, was it?

A. It was lopped over. Yes, sir.

Q. Lopped over?

A. Yes, sir.

Q. How far, when you pushed it north, how far did you push it?

A. Oh, I presume an inch, or an inch and a half. Some wheres along about that.

Q. And it didn't stay there?

A. No, sir.

Q. The car was moving slowly, was it?

A. Yes, sir.

Q. Had no trouble in working about the coupler to push it over with your hands?

A. No, sir.

Q. Did it push over easily, was it very hard to push over?

A. Oh, just ordinarily. Nothing more than common.

Q. When you saw that it would not stay over, why didn't you put something between it and the draft timbers to hold it over?

A. Don't do that kind of work on a moving car.

Q. What kind of work on a moving car?

A. Don't do that kind of work on a moving car.

Q. Why, you testified at one of the other trials you did, didn't you?

A. Not on moving car.

Q. Haven't you testified that when the draw bar wasn't in the center, that you frequently would get a cinder, or a sliver, or something of that kind and put between the coupler and draw-bar, to hold it in line?

44 A. I cannot recall. I did not do that kind of work on a moving car.

Q. You did it on a car that had a coupler in that condition, didn't you?

PLAINTIFF'S COUNSEL: I object to that as not proper cross examination.

COURT: The objection will be overruled, to which ruling of the Court plaintiff excepts.

(Question repeated by stenographer.)

A. No sir, not on moving car like that was.

Q. I will ask you if you do not remember, Mr. Brinkmeier, that you have heretofore testified in this case, both in answer to questions

by me and by Mr. Ferguson, that you would block over a draw-bar if it was not in line with a clinker or piece of wood, or something of that kind, instead of using your foot or hand.

PLAINTIFF'S COUNSEL: Objected to as leading, calling for a conclusion and not proper cross examination. It is proper to read, if he so testified. The record is here.

COURT: The objection will be overruled, to which ruling of the Court plaintiff excepts.

A. I do not remember. I have never blocked a car over while it was in motion.

Q. Was there anything there to prevent you allowing that car to come to a standstill and then block it over?

A. I was there assisting to make that coupling, and I took the way of assisting, the ways I have been doing before.

DEFENDANT'S COUNSEL: I will ask that the witness be required to answer the question.

COURT: Repeat the question, and then confine yourself to answering the questions, Mr. Brinkmeier.

(Question repeated by stenographer.)

"Q. Was there anything to prevent you allowing that car to come to a standstill, and then block it over?"

A. The car did not come to a standstill. It was coming down against the other cars.

45 Q. It hadn't yet come to a stand still?

A. No sir.

Q. Was there anything to prevent you from allowing it to come to a stand still and then blocking it over before making the coupling?

A. I don't know. Can tell better about that after it came to a stand still.

Q. What was there to prevent you from allowing it to come to a stand still before you attempted to make the coupling at all?

A. Didn't come to a stand still, because it went against the other cars.

Q. It would come to a stand still then, wouldn't it?

A. They came to a standstill some time. I do not know when.

Q. It was runinng slowly, you say?

A. Yes, sir.

Q. When it ran against the standing cars, it would come to a stand still, and stop, wouldn't it?

A. Yes, sir.

Q. What was there to prevent you from allowing it to come to a stand still?

A. I was there to make that coupling. I was there, hired to assist and make couplings.

Q. You hadn't been told to make this particular coupling?

A. Not told by anybody. It is regular routine of business; doing switching.

Q. No one there, but you?

A. I have told you time and again, there was nobody there but me.

Q. What was there to prevent you from allowing that car to come to a stand still, and then blocking it over, if you knew it was lopped over.

A. There was nothing there, ordinarily, to keep me from making that coupling, that I seen.

Q. Nothing there to keep you from making the coupling?

A. I was hired—— (Interruption.)

46 Q. Nothing there to compel you to make that coupling?

A. I was there, hired and paid to make couplings, and assist in making couplings.

Q. Nothing there to compel you to make the coupling at that time, was there?

A. I do not know.

Q. What was there to compel you, what emergency existed if any; or who was there ordering you, or anything of that kind, which compelled you to make the coupling at that time?

A. I was there assisting to make that coupling. That is our business. I thought it was. I was hired by the Missouri Pacific to do that work.

Q. Suppose you hadn't made the coupling?

A. I didn't make it.

Q. Suppose instead of trying to make it in the way that you did, you had allowed the car to move and run against the standing car, it wouldn't have hurt anything, would it?

A. I do not know. After they strike, you can tell more about it. After they come together you can tell better what the results are.

Q. Was there anything to indicate there would be anything damaged, if you allowed them to come together without coupling?

A. I do not know. You can tell better after they come together.

Q. Was it your judgment they would be damaged if they came together.

A. My judgment was, I was going to make that coupling.

Q. Make it whether or no?

A. No, sir. I was there assisting to make that coupling.

Q. Don't you know if you had permitted these cars to come together without making the coupling, no damage would have been done?

A. Perhaps, I would have been knocked out of a job; been looking for something to eat at a back door.

Q. If you did not make that coupling?

A. If I did not make that coupling.

47 Q. Is that the reason you did it?

A. No sir; it was my business to assist in making the coupling.

Q. Hav-n't you testified that if you had permitted these cars to come together without trying to make the couplings there would not have been any damage to the Company's property or to you?

A. I do not recall whether I said it or not.

Q. Well, isn't it a fact?

A. I do not know.

Q. If you hadn't attempted to make the coupling in the way you did, you would not have been injured, would you?

A. I do not know. I might have got hurt in some way.

Q. That is an entire mystery, is it, whether you would have gotten hurt?

A. I do not know; could not tell.

Q. You are testifying earnestly, you could not tell whether you would have been hurt or not, if you hadn't put your foot up there?

A. I do not know; could tell better after the results.

Q. If you had tried to make the coupling without putting your foot up, is there any chance you would have been hurt?

A. I do not know. Something might have happened.

Q. By the cars coming together?

A. Yes sir.

Q. Did you think anything would happen?

A. I do not know.

Q. Can you think of anything now that would have happened?

A. That isn't at the time.

Q. You have got a good chance now, can you think of anything that would have happened, if you had not tried to couple it by putting your foot up there?

A. I don't know.

48 COURT: It seems to me you have gone far enough into that matter.

DEFENDANT'S COUNSEL: I cannot get an answer.

Q. Now, upon the moving car was what is known as the Tower Automatic Coupler?

A. On the moving car, a Tower? Yes sir.

Q. Tower Automatic Coupler?

A. Yes sir.

Q. And on the standing car was what is known as the Hein Automatic Coupler?

A. Yes sir.

Q. Is it Hein?

A. I think it is spelled "H-e-i-n."

Q. H-e-i-n?

A. I think so.

Q. Are these automatic couplers that are in general use on railroads?

A. Yes sir.

Q. Come together?

A. Yes sir.

Q. And they did work with one another, interchangeably?

A. They worked by impact, when in working order.

Q. I mean the Hein and Tower and those, all work interchang-ably?

A. Yes sir.

Q. Made on the same principle, so can be worked together?

A. Yes sir.

Q. You went to the coupler on the standing car and you found that all right?

A. I found the knuckle closed, and I opened it.

Q. May be all right with the knuckle closed?

A. Yes sir.

Q. You found that coupler in the center, and it was all right?

A. Yes sir. To the best of my knowledge.

Q. You simply went to the car and raised the pin and opened the coupler?

A. Raised the lever, and took hold of the knuckle—that coupler, you have got to raise the pin, also take hold of the knuckle in order to open, if I am not mistaken.

49 Q. You found nothing wrong with the coupler on the standing car?

A. No sir.

Q. And you had no trouble with it, did you?

A. No sir.

Q. Now, after the knuckle was opened, you stayed there some little time before the other car came up?

A. A little bit.

Q. The other car, I believe you said, was about a half car length away from you when you were ready?

A. About that.

Q. You stood at the side of the car waiting for it to come?

A. Yes sir.

Q. You were looking towards the moving car as it came towards you, were you?

A. I did not have time to look, any more than I seen that the coupler had got back from the center of the car.

Q. You knew that before?

A. Yes sir. I seen it was back to where I had found it the first time.

Q. You were standing in front of the car as it was coming towards the standing car?

A. Yes sir.

Q. And stood by the standing car?

A. Yes sir.

Q. With your hand holding to the grab irons, or whatever they are called?

A. Yes sir.

Q. On the standing car?

A. Yes sir.

Q. Referring to model. This car marked "A" represents the salt car. It was the moving car and the model marked "b" represents the standing car, to which the salt car was to be coupled, which you were endeavoring to couple?

DEFENDANT'S COUNSEL: It is agreed that the car marked "A" represents the salt car No. 17555 and the car marked "B" is a model representing the other car. It is not intended that these are fac-

similes of the original cars, but made after the fashion of those cars, to illustrate the conditions existing at the time.

50 PLAINTIFF'S COUNSEL: And also car marked "A. T. & S. F. No. 17250," all three of said models containing fair models of couplings, with their attachments, illustrative of the kinds now being considered.

Q. As this moving car came west, marked "A", you were standing outside of the rails, at the end of the standing car?
A. Yes sir.
Q. And you were there, looking towards the moving car as it came on west?
A. Yes sir. I got a glance at it; that is about all. There wasn't much distance any more to look around.
Q. Was that car at any time after you went around to the front of it, running at any rapid rate of speed?
A. No sir.
Q. Just about as you would walk?
A. Yes sir.
Q. What was there to prevent you from seeing fully the condition of the coupler on the west end of the moving car?
A. I do not know. I looked at it. I did not see anything ordinarily out of the way. I had time to look at it to see that I could see.
Q. You looked at it fully, did you?
A. I looked at it. I did not see anything out of the way. Only what I have said several times.
Q. You could see everything in a moment that was to be seen?

PLAINTIFF'S COUNSEL: I object to that as calling for a conclusion.

A. I don't know.
Q. Was there anything to prevent you knowing its entire and full condition?
A. The car was moving westward, and I had to walk sideways to keep that car from tramping on me.
Q. You were on both sides?
A. I ran over there. I did not have to run far.
Q. What was there to prevent you from seeing the condition of the car, while standing at the standing car?
A. No, I could not. It was too short a time.
Q. Could you see it was lopped over?
51 A. It was lopped over a little bit to one side. Yes sir.
Q. Now, these couplers do not have to be exactly in the center, in order to make the coupling?
A. Yes sir.
Q. You say they can vary a little?
A. Designed to be in the center of the car.
Q. Have you testified they did not need to be in the center of the car exactly?
A. I do not know. They are designed to be in the center of the car.

Q. I did not ask what is designed. Isn't it true that these automatic couplers are made in such a way that when one of them is out of center a little, they will work?

A. They are worked in the center of the car; that is where they are designed to work, and that is all I know.

Q. You do not know whether they could be a little out of the center and still work?

A. I do not know.

Q. You haven't tried them?

A. I cannot recall that I have.

Q. You did not permit these cars to come together first, to see whether they would couple, before putting your foot up?

A. I didn't see nothing out of the way, particular, to do that.

Q. I do not understand what you mean. I asked you whether you permitted the cars to come together first, to see whether they would couple?

A. I did not see anything out of the way——

PLAINTIFF'S COUNSEL: Answer the question.

COURT: Answer the question. Did you let the cars come together first?

A. No sir.

COURT: Answer the questions and then we will get along faster.

52 Q. When you put your foot up against the couplers on the moving car, you had to reach forward a little, didn't you as well as towards the center of the track?

A. I was standing just on the outside of the rail. It is nothing hard for me and wasn't when I had both feet to reach that coupler with my foot.

Q. Have to reach it as it was coming towards you?

A. No sir. Did not reach my foot out when it was coming towards me.

Q. What did you do?

A. I placed my foot against the coupler of the moving car just about the time they were ready to enter.

Q. You were standing over here at the end of this car?

A. Yes sir.

Q. How far out do these couplers stand from the car?

A. I do not know the exact distance, how far they stand out.

Q. Don't you know about?

A. Well, I haven't measured them. I do not remember just exactly how far they are.

Q. Can you give some idea, whether five inches, or two feet. You say you have worked with them a good many years?

COURT: Answer the question. Can you give any idea?

A. I think there is about between two or three feet between the two cars. About that. I do not know the exact distance between the two cars when coupled together.

Q. Extend out there a foot to a foot and a half?
A. About that, yes. Whatever distance it is. I do not know exactly the amount of inches.
Q. Standing there at the east end of this standing car, outside of the rail, when you reached for this coupler on the moving car, where would you put your foot to get a foot hold. That seems to be smooth, doesn't it?
A. I put my foot right against that lip, or knuckle guard, the proper name I have learned since.
53 Q. Against the guard arm? (Indicating on model.)
A. I want to see where you have your fingers.
Q. You put your foot against that, did you?
A. Put my foot against this lip of the car.
Q. What part of that lip?
A. Right on the flat surface against there.
Q. Did that sill extend over here, do you think?
A. Yes sir.
Q. That surface on what is called the guard arm is smooth surface, isn't it?
A. Some of them are smooth, some of them are not.
Q. Have no projections on them, have they?
A. Some got smooth surface, and some have different moulds in there. They are not all smooth.
Q. I do not mean as smooth as glass, but there is no projections on them?
A. They are similar to this. Differents moulds in there; they are creases made in them at the foundry, when they are made.

PLAINTIFF'S COUNSEL: Corrugations is what they are.

Q. Not on this one?
A. I do not remember now, whether there was or not.
Q. They are not on most of them.
A. There is on some of them.
Q. Depends upon the kind of coupler, doesn't it?
A. Yes sir.
Q. You do not remember whether that is the case in the Tower coupler or not?
A. I do not remember.
Q. Well, you put your foot up, standing here at the side of the car, marked Ex. B. You put your foot up on the guard arm on the south side of the guard arm of the moving car?
A. Yes sir.
Q. That knuckle on the standing car was open. When you did that?
A. Yes sir.
54 Q. What closed that knuckle?
A. That is something I cannot tell, because when they were coming together it closed.
Q. When they come together they are meant to close? Aren't they?
A. Yes sir.

Q. Your foot was between the guard arm of the moving car—this edge here on the south side and the knuckle on the standing car. The closed part—the closed knuckle was it not?

A. That knuckle closed on the standing still car and the draw-bars passed. That is the condition I found them in while they were holding me there. That is when I knew that. That knuckle was closed when my foot was held in between there, while the cars standing still, and this draw-bar had passed the coupler of the standing still car, in that position (indicates) with my foot in between. My toes in behind this knuckle there and here.

Q. Your foot was caught between the guard arm of the moving car and the closed knuckle of the standing car?

A. My foot was caught between the guard arm and the closed knuckle of the standing car, and in this place here; whatever you call it.

Q. That is the knuckle, isn't it?

A. I do not know whether you call that the inside, or over near the far end of the knuckle, or what you call that the inside of the knuckle, after it is closed.

Q. After it is closed, it is near the center of the coupler?

A. It was over on this side. Not in the center; over to this side, to the point of the closed knuckle.

Q. Without giving the particular point?

A. That is what I am trying to tell you; where I found my foot.

Q. That is the guard arm of one coupler and the knuckle of the other?

A. On the guard arm of the knuckle that was closed.

Q. That is, the cars only came together once?

A. Yes sir.

55 Q. Your foot was between them when they came together, wasn't it?

A. Yes sir.

Q. How did you get your foot between them before they came together?

A. I do not know when I got my foot—the particular time I got my foot in there. That is where I found my foot after they came together.

Q. You do not know how you got your foot in there?

A. No sir.

Q. Didn't you put your foot on this guard arm and it slipped off and closed the knuckle with your foot? Didn't you put your foot up against the guard arm of the moving car and it slipped off and closed that knuckle, and then the guard arm came against your foot?

A. I don't know. I——

Q. Wait a moment.

PLAINTIFF'S COUNSEL: I object. Let him answer.

COURT: Just a moment.

DEFENDANT'S COUNSEL: I cannot get intelligent answers as long as he keeps on talking.

Q. You have talked about these couplers passing each other. I do not want that misunderstood. Do you call the whole draw bar the coupler?

A. Commonly called the coupler.

Q. Is that what you mean, that one draw head entirely passed the other draw head?

A. Most of it passed entirely the draw head. Cannot pass at all unless it all passes. It all passed except the knuckle guard.

Q. Can one draw-head possibly pass another unless it all passes. Do you mean that the draw head of this moving car passed the other draw-head, so it went clear of the draw head, against the car?

56 A. I did not say it passed that way.

Q. You have said a dozen times that one coupler passed the other coupler. Do you mean it passed in that way?

A. I showed you the condition.

Q. You do not mean this do you, that one draw head passed the other?

PLAINTIFF'S COUNSEL: I submit, this is three times he has gone over that.

COURT: Let him answer that question.

A. Not the way Mr. Benton holds those cars together.

Q. You mean that the draw head on the moving car went over, and although it struck the draw head on the other car, it did not strike it in exactly the right place?

A. I do not know exactly where it struck. I told you where I found my foot, and condition the cars were in when holding my foot.

Q. Then put in words what you mean by one draw head passing the other which you have said so frequently?

COURT: You can explain that once more, what you mean by their passing.

A. Well, them two knuckles; when the cars are coupled is what the cars are pulled by.

Q. Yes?

A As best I can explain, that is the biggest part of the coupler, the knuckle guard is on the other side of it yet.

PLAINTIFF'S COUNSEL: Both having trouble to designate what you are talking about.

Q. When you say that one coupler passed the other, you mean that one coupler passed further north—the coupler on the moving car passed further north than the coupler on the standing car.

A. Yes sir; and a whole lot.

Q It did not pass clear by it, did it?

A. It passed clear by the knuckle of the standing car coupler.

57 Q. Passed by it which way?

A. Went away over from me.

Q. That is this guard arm went further north than it should.

A. Yes sir.

Q. But this guard arm on the moving car did not go over and

pass the guard arm on the standing car, did it, so that one entire draw-head passed the other, going east and west?

A. The guard arms were nearer together than any other part on both cars.

Q. How?

A. The guard arms was nearer together than any part of the couplers of the two cars.

Q. That is the guard arm of the moving car was against the standing car, and your foot between them.

A. It was over just against the end of the coupler, on that coupler on the standing still car.

Q. End of the knuckle?

A. Yes sir.

PLAINTIFF'S COUNSEL: He demonstrated it to you.

DEFENDANT'S COUNSEL: Yes sir, but that don't get it in the record.

Q. Then you found your foot between the guard arm—the sole of your foot was against that closed end of the knuckle of the standing car?

A. And the end of the knuckle of the standing car and the lip of the coupler on the moving car was against the bridge of my foot.

Q. I asked you a simple question, and you have gone to talking again. The sole of your foot was against the closed knuckle of that standing car, was it not?

A. At the end of the closed knuckle.

Q. What do you call the end of it? The north part of it as it is closed here?

A. Yes sir; the end, as I call it.

Q. Now, express in words what you mean by the end of the closed knuckle?

A. Right there.

Q. That would be the north side of the knuckle as it was when it was closed?

A. Yes sir.

58 Q. But the sole of your foot was on the west end of the knuckle—west side of the closed knuckle—east side of the closed knuckle?

PLAINTIFF'S COUNSEL: No.

A. No.

PLAINTIFF'S COUNSEL: You do not mean that. You have your fingers on the west side and say the east side.

Q. Wasn't the sole of your foot against that closed knuckle?

A. The sole of my foot against that knuckle, right there.

COURT: At the edge of it?

A. Right at the edge of the closed knuckle, yes sir.

Q. Of the standing car?

Q. And you have said that your right foot was cut, commencing at the big toe, across the bridge of the foot over towards the heel?

A. No sir. I haven't said that. You are making up something

now. I told you time and again that my foot was mashed from the end of the big toe right across here. (Indicates.)

Q. Isn't that what I said?

A. No sir; not my heel; not over half way back of my foot; right across here. I do not care what you call it.

Q. Put it in words?

A. My foot was cut and broken right from the end of the big toe, right across part of the bridge of my foot and just back of the little toe.

Q. Now, can you state how you could get your foot between these couplers in that position, when you were standing here by this standing car. You were standing there and put your foot up against this, and got the sole of your foot against the knuckle of the standing car, and caught it as you have said?

A. I cannot state it. I told you where I found my foot when the cars came together and was standing still.

Q. You do not know anything about how this happened, then?

A. I do not know how my foot got in there that way.

59 Q. The fact is you put it up on the coupler and it slipped off, that is all?

A. The coupler of the moving car went away from me, is all I know. That is where I lost hold.

Q. If that is what did it, you would simply have had your foot pushed off?

A. I am not suggesting now at all. I told you where I found my foot.

Q. It might have got off that coupler before the cars came together.

A. I do not know.

Q. Do you say you do not know.

A. It happened all there at once. The last I knew I was shoving that draw bar over, and the draw bar got away from me, and then I found my foot in there when the cars stopped.

Q. You do not know how it happened. After they came together that time, they rebounded some, you say?

A. About one foot.

Q. And they did not come together any more?

A. No sir and both knuckles (interruption.)

Q. They just came in contact once?

A. Yes sir and both knuckles were closed, and the coupling not made.

Q. It is not very unusual for cars to come together and for some reason no coupling be made, is it? That happens quite frequently, don't it?

A. When they do not work automatically, coming together, they do not make.

Q. Do not automatic couplers that, so far as you could see were all right, come together frequently and not make, don't they?

A. When in automatic coupling order they couple.

Q. You never knew them not to couple?

A. When in automatic coupling order they couple.

Q. You mean by that, that when they couple, they couple?

A. When in automatic coupling order.

60 Q. I ask you whether automatic couplers may come together in apparent good condition, as far as you can see, and yet do not make the first time, do they not?

A. When they do not make, they are not in automatic working order.

Q. That is not answering the question?

A. If they do not couple, they are not in automatic working order.

Q. You had no trouble answering that question on the other trial?

COURT: The question is whether these automatic couplers some times fail to work, is that true or isn't it?

A. Well, as I answered; they fail to couple, and they are not in automatic——

COURT: They fail to work some times.

A. That is, that makes them not automatic.

Q. Haven't you seen cars come together when they were equipped with what was called automatic couplers, and fail to couple then be brought together again without any change or difference apparently, and then couple all right. You have seen that frequently, haven't you?

A. No sir. I do not know. When they are in automatic coupling order, they couple, and when they don't, they are—— (interruption.)

COURT: That is not the question.

(Stenographer repeats question).

COURT: That was the question, have you or have you not seen such a thing done?

A. I don't recall.

COURT: Very well. Put your next question.

Q. Didn't you testify on the other trial or the last trial in answer to that matter, as follows:

"Q. Often when you could see nothing out of the way with the couplers you have known them not to couple the first time?

"A. Sometimes don't; as a rule they do."

Q. And the question then asked before:

61 "Q. When near the center?"

"A. Yes sir."

"Q. Like other machines sometimes don't work right?"

"A. Yes sir."

Q. Didn't you testify to that?

A. I cannot recall.

Q. Isn't that a fact?

A. I do not know. When they don't work, they are not in automatic working order.

PLAINTIFF'S COUNSEL: That is enough. He is not asking you any questions now.

DEFENDANT'S COUNSEL: Not at all.

Q. Didn't you say upon the other trial, in answer to this question:

"Q. They don't have to be exactly in the center of the car to couple?" And your answer was: "A. Near the center." Is that true?

A. They have to be in the center of the car.

Q. Isn't it true that they have to be near the center of the car?

A. They are designed to work in the center of the car.

Q. Haven't you seen them work when just near the center, and not exactly in the center?

A. Possibly a half inch, or something like that. I do not know.

Q. And don't you know that they are designed to couple when not exactly in the center.

A. They are designed to couple in the center of the car.

Q. Don't you know they are designed to, and do work when not exactly in the center of the car?

COURT: Do you know that?

A. All I know is they are designed to work in the center of the car.

COURT: The question is, whether you know whether they are designed to couple when not in the center?

A. No.

COURT: Then say so.

62 Q. You have known these cars to be coupled on curves, I suppose; where the road curves?

A. Yes sir.

Q. And of course the trains must run on curves?

A. Yes sir.

PLAINTIFF'S COUNSEL: I submit, that is not proper cross examination.

COURT: It is proper to test his knowledge.

PLAINTIFF'S COUNSEL: Nothing of that kind involved in the original examination.

COURT: He is entitled to go further in cross examination in matters of this kind, to test the knowledge of the witness.

To which plaintiff excepts.

A. When cars are on curves—(interruption).

Q. I haven't asked you yet.

COURT: Put your next question.

Q. When the cars are being coupled on a curve, isn't it true that the couplers will not work exactly in the center?

PLAINTIFF'S COUNSEL: I object to that as not proper cross examination.

COURT: In testing his knowledge you have a right to go into that matter.

To which ruling of the court plaintiff excepts.

A. When cars are on curves, both cars are curving the same way. Each coupler on each draw bar goes out whatever distance they have

to go, and they still are in the center, as they are designed to work, because both couplers are alike in that way. A car on a curve standing still is inclined to be that way. (Shows) And the car coming towards us, the same way, and if they are in the proper place, in the center of the car, they will make.

Q. When on curves isn't the coupler over from the center of the car a little?

A. On both cars?

Q. On both cars?

A. And they are still working in the center of the car because both come over whatever the degree of the curve is in the track, and whatever degree it takes for the couplers to come over that way, they are both cars the same.

63 Q. Isn't it true that at the time you undertook to put your foot up on the moving car, that you had hold of the grab iron, or hand hold of the moving car?

A. No sir. I never grabbed the second car. When cars are not coupled, don't hold on that way.

Q. Didn't you this time?

A. No sir.

PLAINTIFF'S COUNSEL: He said so.

DEFENDANT'S COUNSEL: He didn't have to say anything further.

A. These cars might part so far as to tear me to pieces, if I held on both cars.

Q. Now, upon the last trial, when you was asked about blocking this over, were you not asked this question:

"Q. Why didn't you put something in that place, when you pushed it over, to hold it there?

PLAINTIFF'S COUNSEL: If the court please, he has — already asked and answered that.

"A. Did not deem it necessary."

"Q. Did not deem it necessary?"

"A. No sir."

"Q. You say it would not stay over?"

"A. No sir."

"Q. Wasn't it necessary to have it over?"

"A. It was not in bad condition enough in my knowledge to do anything like that."

"Q. Did you—You knew it would not stay in the center?"

"A. Yes sir."

"Q. If you had put a block in there, you would have made it stay there without putting your foot on it?"

"A. I do not know."

"Q. Have done that frequently, haven't you?"

"A. I have done it on cars that to my knowledge were dangerous to me."

"Q. Frequently?"

"A. I have done it."

"Q. You testified before that was the thing you did."

"A. I have done it when I considered it dangerous to work with them otherwise."

64 Didn't you testify to that, the last trial?

A. I cannot recall. I never block a car over, that I remember, when it is moving. Might do something like that when a car is on the rip track.

COURT: He has answered the question; says he does not remember.

Q. Did you upon the first trial in this case testify in this way?

"Q. If you were standing each or west of the coupling appliance of the moving car and put your foot against that and got it between the knuckle and the guard arm or the lip of the moving car, between the knuckle of the standing car and the lip of the moving car, wouldn't the inside of your right foot been between these two coupling appliances, instead of the outside of your foot?"

"A. The sole of my shoe was against this, and the top of my shoe was against this, in this shape (Indicates)."

"Q. The sole of your shoe was against the knuckle of the standing car?"

"A. Yes sir."

"Q. And was in fact, on the east side of it?"

"A. Yes sir."

Q. Isn't that what you testified to?

A. I cannot recall.

Q. Didn't you upon the last trial of this case testify that you did not know whether the sole of your foot was against the knuckle?

A. This is the third time I have illustrated to you the position my foot was in when the cars stopped. I cannot recall——

Q. Upon the last trial of this case, didn't you testify you didn't know what position your foot was in between these couplers?

A. I do not know. I have illustrated to you the third time—— (Interruption.)

65 COURT: Never mind answer the question and stop.

PLAINTIFF'S COUNSEL: Answer the question the best you can and stop.

A. I do not know; cannot recall.

Q. Did you testify upon the first trial that when the draw head of one car would work over to one side that you frequently blocked them over with a splinter, or cinder, so they would couple, without going in there?

A. I cannot recall. Never blocked a moving car over yet.

Q. Isn't it true that you never, on either of the other trials, made any distinction between moving car and standing car. Isn't this the first time you have mentioned about not blocking a moving car?

A. I cannot recall. I am talking about a moving car which this car was.

Q. I asked you this:

"In making couplings, when you find the draw bars in the condition you found this one in, and they come together and won't make, what do you do?"

"A. Go find something and block them over, so they will make."

"Q. How often does that occur?"
"A. Often—quite frequently."
Do you remember giving that testimony on the first trial in this case?
A. I cannot recall. All I remember is you asking frequently, could I not find a cinder to block it.
Q. On suggestion of your own counsel, didn't you give this answer:
"Did you ever use a cinder to repair cars in the condition this was?"
"A. I have blocked them over."
"Q. With cinders?"
"A. It would have to be a clinker, like a rock."
"Q. Something of a hard substance?'
"A. Yes sir."
Didn't you answer these questions that way?
COURT: The only question is whether you so testified?
A. I cannot recall.
66 Q. Do you recall now, since I have refreshed your recollection, that you have blocked them over frequently, with cinders, or hard substances, when you found them out of line?
A. When I found them bad order and cars standing still, and ordered to do so by the conductor, or anything like that, I have done it.
Q. You would wait until all that came about?
A. Yes sir. Bad order car.
Q. If a bad order car was moving, you would let it come together, and then block it over?
A. I do not recall.
Q. Had you uncoupled this car before?

PLAINTIFF'S COUNSEL: I object. He has been all over that.
COURT: The objection will be overruled.
To which ruling of the court plaintiff excepts.

Question repeated by stenographer.)

A. I do not remember whether I coupled it or not, or uncoupled it.
Q. About how heavy are those draw bars?

PLAINTIFF'S COUNSEL: I object. That is improper cross examination.
COURT: The objection will be overruled.
To which ruling of the court plaintiff excepts.

A. I do not know the weight of a draw bar.
Q. You know about, don't you? You have worked with them a good deal?
A. Oh, they weigh a hundred pounds or more. Something like that.
Q. Weigh more than that, don't they—couple of hundred?
A. I do not know.
Q. Pretty heavy?

A. Weigh a hundred pounds or more, I should judge.
Q. Do you know the distance across them—the face of them?
A. No sir.
67 Q. Do you know about?
A. No sir. I could not tell the distance. I know the distance of them, when I see them, but the inches, etc., I do not know.
Q. Do you know the thickness, up and down?
A. No sir, I do not.
Q. Do you know what the dimensions of the knuckles are?
A. No, sir. I do not.
Q. That flat surface?
A. No sir. If I was car inspector, I might tell you.
Q. I believe you have stated, Mr. Brinkmeier, if I understand it that on the coupling appliance of this standing car, you found nothing wrong about it?
A. No sir.
Q. Is it necessary for both knuckles to be open, or one of them?
A. When one of them is open the coupling will make, if they work automatically.
Q. If in proper condition or shape to couple when one is open, are they?
A. Yes sir.
Q. You may look at this statement, and I will ask if you signed this statement?
A. That is my name.
Q. That is not what I asked you.
A. That is my name on there.
COURT: Is that your signature?
A. That is my signature.

Mr. BENTON, for defendant; I offer this in evidence as part of the cross examination.
PLAINTIFF'S COUNSEL: I object to it, as incompetent, irrelevant and immaterial, and not proper cross examination.
DEFENDANT'S COUNSEL: It is the same paper we had up before.
(Paper marked "Ex. B.")

68 COURT: I think this is competent as an admission, and I will admit it over the objectijon of the plaintiff and you can show the circumstances under which it was obtained on your examination of the witness.
Mr. HARRIS, for plaintiff: As I understand, the circumstances under which it was given can be shown by Mr. Brinkmeier.
COURT: Yes sir.
Mr. BENTON, for defendant: Do you mean you will take testimony with reference to an attempt to compromise this case?

COURT: No sir. Just where he was and how he came to execute it.
To which ruling of the court plaintiff excepts.
Mr. Brinkmeier on stand.
COURT: You may proceed.
And thereupon Mr. Benton, counsel for defendant reads state-

ment to the jury. Said statement is set forth on pages — of this record.

Q. Now there are two or three other questions I wish to call your attention to.

Mr. FERGUSON, for plaintiff: We desire to interrogate the witness as to what the circumstances were.

COURT: You may do so when you come to redirect examination.

Q. I will ask you if this evidence was not given on the first trial of this case, in speaking of what would have happened if you had let the cars come together without being coupled:

"Q. Well, now, what would have happened, now what would have been the result if you had let the cars come together and not coupled?"

"A. Well, the coupling would not have been made."

"Q. That is all that would have happened?"

"A. That is all that would have happened."

"Q. You would not have been hurt? The Company's property would not have been hurt."

COURT: Answer the question.

69 "A. I was there to make that coupling.

"COURT: Answer the question put to you. You mean if the coupling hadn't been made.

"Q. Yes sir. If they had gone together and the coupling not been made, would not have resulted in injury to any one, would it?

"A. The only answer I can make—— (Interruption.)

"COURT: Answer the question.

"Q. Answer 'No.' "

Do you remember giving that?

PLAINTIFF'S COUNSEL: I object to that; he has been over that at least twice.

COURT: The objection will be overruled.

To which ruling of the court plaintiff excepts.

A. I cannot recall.

Q. Do you recollect this testimony on the first trial:

"Q. If you had let these cars come together and failed to couple, what was there to prevent you getting a little block and putting between the draw bar and draft timbers?"

"A. Suppose I would.

"Q. What?

"A. Suppose I would.

"Q. You would have done it?

"A. Yes sir.

"Q. Were you intending to take these cars out on this train?

"A. That was for the conductor to say. I do not know whether they made a bill for it or not. I did not handle the switching."

Do you remember that testimony?

PLAINTIFF'S COUNSEL: I object to that as not proper cross examination, and having been gone over previously.

COURT: The objection is overruled.
To which ruling of the court plaintiff excepts.

A. I cannot recall.
Q. Do you remember giving this testimony on the first trial of this case, in speaking of pushing the coupler over on the moving car, were you asked this question:
"Now if you succeeded in pushing it over, what was there to strike your foot to knock it between these couplers?
"A. My foot just slipped forward in there."

70 PLAINTIFF'S COUNSEL: I object as not proper cross examination and having been gone over at this time previously.

COURT: The objection will be overruled.
To which ruling of the court plaintiff excepts.

Q. Is that your testimony?
A. I cannot recall.
Q. Don't you remember testifying your foot slipped off that, between the couplers, didn't it?
A. Yes sir. It must have done that.
Q. Didn't you testify to that?
A. No sir. I do not remember.
Q. Do you mean you didn't, or that you do not remember?
A. I do not remember.
Q. Don't you remember whether that is a fact?

PLAINTIFF'S COUNSEL: I object to that, he has asked that repeatedly, on this cross examination.
COURT: The objection will be sustained.
To which ruling of the court defendant excepts.

Redirect examination of HENRY BRINKMEIER, plaintiff.

By Mr. FERGUSON:

Q. We desire to interrogate the witness about this statement. Mr. Brinkmeier do you remember having been in St. Louis Missouri, in relation to this paper that purports to have been made and executed?
A. I was in St. Louis with you, to see Mr. Jones, General Claim Agent, to make settlement.

DEFENDANT'S COUNSEL: I object to this and move to strike out any evidence of that kind.
—: The objection and motion will be sustained.
To which ruling of the court plaintiff excepts.

DEFENDANT'S COUNSEL: And I wish to suggest that if they wish to test the competency of this, that that would be a matter for the court, if they wish to show it is not true.
COURT: I will allow him to show where it was made; I will not allow evidence to be brought out as to the latter part of the
71 answer; that will be stricken from the record.
To which ruling of the court plaintiffs excepts.

Q. Was this statement made in St. Louis, Mo.?
A. I signed my name to a piece of paper in St. Louis, what it was, I do not know.
Q. Who prepared the questions in the interview; that interview between you and the person?
A. And had me to sign it?
Q. Yes.
A. Mr. Jones, General Claim Agent, at St. Louis.
Q. General Claim Agent of who?
A. Missouri Pacific.
Q. How did you come to go there? Who sent for you, if anybody?

DEFENDANT'S COUNSEL: I object to that as incompetent, irrelevant and immaterial.
COURT: The objection is overruled.
To which ruling of the court defendant excepts.

A. I was sent there through Doctor Oldham, the Company physician of the Missouri Pacific Hospital Association, located at Wichita, Kansas.
Q. Who sent for you?
A. Nobody sent for me.

DEFENDANT'S COUNSEL: I object as incompetent, irrelevant and immaterial.

COURT: The objection is overruled.
To which ruling of the court defendant excepts.

Q. Do you know if anybody sent for you to come to St. Louis?
A. No sir. Dr. Oldham sent me.
Q. How did you travel, by rail?
A. Yes sir.
Q. Were you furnished with transportation?
A. I was furnished with transportation by Dr. Oldham, to go to St. Louis, to see Mr. Jones, General Claim Agent.

DEFENDANT'S COUNSEL: I object to that question as incompetent, irrelevant and immaterial.
72 COURT: The objection will be overruled.
To which ruling of the court defendant excepts.
When you got to Mr. Jones' office did he say to you anything about having sent for you, and wanting to talk to you?

DEFENDANT'S COUNSEL: I object to that as incompetent, irrelevant and immaterial.
COURT: This objection is overruled.
To which ruling of the court defendant excepts.

A. He then said he sent for me.
Q. What did he say he wanted to talk with you about?

DEFENDANT'S COUNSEL: I object to that as incompetent, irrelevant and immaterial.

COURT: The objection will be sustained.
To which ruling of the court plaintiff excepts.

Q. What did he say to you?

DEFENDANT'S COUNSEL: I object to that as incompetent, irrelevant and immaterial.
COURT: That will be sustained.
To which ruling of the court plaintiff excepts.

Q. What questions, if any, did he propound to you?

DEFENDANT'S COUNSEL: I object to that as incompetent, irrelevant and immaterial.
COURT: The objection will be sustained.
To which ruling of the court plaintiff excepts.

Q. Did you have any talk with him?

DEFENDANT'S COUNSEL: I object to that as incompetent, irrelevant and immaterial.
COURT: The objection will be sustained.
To which ruling of the court plaintiff excepts.
PLAINTIFF'S COUNSEL: We save exceptions to all rulings.
COURT: Certainly, you have that whether you save it or not.

Q. What was your physical and mental condition at the time, Mr. Brinkmeier?

A. Not very good at the time I was at St. Louis.

73 Q. What was the trouble?

A. Loss of a foot. From the 15th day of November until the day I was in St. Louis to see Mr. Jones, and not healed up and still under medical treatment. Discharged from the hospital not healed—suffering all the time. I was out on the road all night, going to St. Louis.

DEFENDANT'S COUNSEL: I object to this.
PLAINTIFF'S COUNSEL: That is all.
COURT: Anything further on redirect.
PLAINTIFF'S COUNSEL: No sir.

Recross-examination of HENRY BRINKMEIER, plaintiff.

By Mr. BENTON, for defendant.

Q. What is your weight now?
PLAINTIFF'S COUNSEL: I object to that as not proper cross examination.

DEFENDANT'S COUNSEL: No, I will withdraw that.
COURT: You may answer the question.

A. Right now, I do not know how much. At the time of the accident—(interruption).

PLAINTIFF'S COUNSEL: No. Talking about right now.

A. Well, I haven't weighed for seven or eight months as I know of. I judge I weigh between 190 and 200 pounds.

74 R. J. MOLENEAUX, called as a witness on behalf of plaintiff, having been duly sworn, testifies as follows:

Examination in chief by Mr. FERGUSON.

Q. State your name to the court and jury, please?
A. R. J. Moleneaux.
Q. Where do you reside at this time?
A. Wichita, Kansas.
Q. You formerly lived, in Hutchinson?
A. Yes sir.
Q. Lived there in 1900?
A. Yes sir.
Q. What is your business, Mr. Moleneaux?
A. Boilermaker.
Q. How old are you?
A. Thirty-six.
Q. What part of the City of Hutchinson were you living in in 1900?
A. Southeast part.
Q. What street?
A. Avenue G. East.
Q. Is that near the Missouri Pacific Railway tracks in that city?
A. Yes sir, on the south of it.
Q. Right along side of the track?
A. Yes sir.
Q. Which side of the track did you live on?
A. The south side.
Q. How far from the railroad track to your house?
A. About fifty feet.
Q. What direction did the railroad tracks run at that place?
A. East and west.
Q. How many tracks were there there?
A. Two.
Q. One main line and the other side track?
A. Yes sir.
Q. On which side was the side track?
A. North side.
Q. How long did you live there?
A. Oh, I don't know about that; probably two or three months. May be not that long.
Q. What is your business at this time, and by whom are you employed?
A. The Missouri Pacific Railway Company, Boiler Department.
75 Q. In this city?
A. Yes sir.
Q. Did you ever do any switching or braking in the employ of the railroad company?
A. No sir.
Q. Did you know the plaintiff Mr. Brinkmeier, here?
A. Yes sir.

Q. Did you know him at that time?
A. No sir.
Q. Were you at home on the 12th day of November, 1900 when he received the injury up there?
A. Yes sir.
Q. Did you see him on that day?
A. Yes sir.
Q. When did you first see him on that day?
A. Right along there in front of my house.
Q. What was he doing when you first saw him, Mr. Moleneaux?
A. It appears to me he was walking along the side of a box car. I could not say positive.
Q. Were the cars he was working with on the move?
A. Yes sir.
Q. Which way were they going?
A. West.
Q. How many were there?
A. Three or four.
Q. Where did he proceed to, if you observed, after he landed on the ground?
A. He went to the west end of the west car, and went in between them; and I think the next time I saw him, he was standing at the east end of the still car on the south side of the track.
Q. By that still car, on the south side of the track?
A. Yes sir.
Q. About how far apart were those cars, when you first observed him, after you observed him?
A. Might have been a car and a half something like that.
Q. How long are these cars, as a rule?
A. I do not know. 30, I guess, and 36 feet.
Q. What rate of speed were these cars going, Mr. Moleneaux?
A. Just moving real slow. I presume a man could walk ahead of them.
Q. Did they increase or diminish in speed, as they moved westward?
76 A. I presume they decreased in speed.
Q. What did Mr. Brinkmeier do, if you saw him do anything, as he went to these cars?
A. I could not say as to that. I see him standing there and I turned and was looking east, I believe; and the next thing I heard was somebody hollow, and I looked over and he was just sitting down on the ground, then motioned for me to come toward him.
Q. Did you see him moving along between these cars as they were coming together before he went to the standing car?
A. Yes sir.
Q. Which way was he facing?
A. I think he was facing north, with his back to me, the last time I saw him after he stepped in between the cars.
Q. Did you go to him?
A. Yes sir.

Q. What condition did you find him in, when you arrived there, and what did you say or do to him?

A. He was sitting there on the ground. I found him with his foot mashed, I judge right across there. (Shows).

Q. Did you take his shoe off him?

A. He pulled out a knife and I cut his shoe off his foot.

Q. Foot broken any?

A. Yes sir; bone sticking out through it.

Q. What kind of day was that, Mr. Moleneaux?

A. I believe it was a nice day.

Q. What time of the day was it?

A. What time? I could not say about that: though along probably the middle of the afternoon. Some time after dinner, I know.

Q. You say you saw him standing at the east end of the standing car—inside or outside the rail?

A. Outside.

Q. Facing which way?

A. North or northeast.

Q. You saw these cars as they was coming together?

A. Yes sir.

Q. Where was Brinkmeier taken then, if you know?

A. To my father's house, directly south of where he was hurt.

Q. You and your father lived together?

A. Next door.

77 Q. Who, if any person, came to the point where Brinkmeier was injured, until you took him to the house?

A. Why,there was Harve-Waltman, Judge Shives, a fellow by the name of Walstrome, Wil Walty, and I don't know whether the engineer was down there or not, but I know these parties were there.

Q. Members of this train crew, except Walstrome.

A. Yes sir.

Q. He was a passerby?

A. Yes sir.

Q. Was there anything between you and these cars or Mr. Brinkmeier from the time you observed him until the time you went to him to obstruct your view?

A. Some small trees in the yard.

Q. Could you see plainly what was going on?

A. Yes sir.

Q. What, if anything, if you know, was done with these cars, after Mr. Brinkmeier was taken over to the house?

A. Why, they were coupled up and pulled out of there, I believe.

Q. Who, if any one, tried to make the coupling, or made the coupling?

A. The other brakeman and the conductor, Shives and Harvey Waltman.

Q. Did you see Shives make an effort to couple it?

A. Yes sir.

Q. Did he succeed?

A. No sir.

Q. Then did conductor Waltman join him in some other efforts?
A. Yes sir.
Q. Describe to the jury what they did, if anything, with this coupling on this moving car, if anything, to have it couple?
A. Well, I could not say, any more than they made an attempt to couple the cars and they did not couple and when they did couple them finally, they was kicked down below me some distance, and I did not stand right where I could see what they did do.

78 Q. Did you see them get any piece of wood or anything to use?
A. Yes sir.
Q. Who got that?
A. Harvey Waltman.
Q. Where did he go with it?
A. In between the cars.
Q. Which one did he seem to be working with; the standing or moving car?
A. I could not see which one.
Q. Did you see the standing car when you went up there?
A. Yes sir.
Q. Did you observe the draw-bars and couplers?
A. Why, I looked at it.
Q. Describe the condition of that coupler on the moving car, as you saw it, when you went up there?
A. Why, you mean the drawhead?
Q. Yes?
A. Why the drawhead seemed as though it would lay over to the south side of the car, and the knuckle instead of being up straight like that, would be lopped over like that, on the moving car.
Q. How about the opening that held the drawbar in these cars here at the end. Did it fit up? You say it lopped. You mean in that attitude?
A. Yes sir.
Q. Was there any apparent unusual space around that drawbar?

DEFENDANT'S COUNSEL: I object to that as incompetent and asking for an opinion.
COURT: The objection is sustained.
To which ruling of the court plaintiff excepts.

Q. State whether or not you observed whether there was any space around this drawbar.
A. Yes sir. There was pretty plenty of space there.
Q. Which side did it appear to be on?
A. I could not say as to that.
Q. You did not make that critical an examination?
A. No sir, I did not.

79 Q. From what you saw of the space there, would this draw bar turn over in the hole?

DEFENDANT'S COUNSEL: I object to that.
COURT: It will be sustained, unless qualified.
To which ruling of the court plaintiff excepts.

Q. State whether or not, after examining it, if it had space to play sideways and up and down?

A. Yes sir, I think it had plenty of room in there.

Q. Was that space great enough so the drawbar could have been turned over in its fastenings?

DEFENDANT'S COUNSEL: I object to that as incompetent, and asking for an opinion.

COURT: It is sustained.

To which plaintiff excepts.

Q. How much space was there in the draw head around that car?

A. I could not tell exactly.

Q. Approximately, as you saw it?

A. I could not tell myself, how much space is required in there, but it looked to me as if there was all kinds of room in there.

Q. Think it could play up and down and sideways?

A. Yes sir, both ways.

Q. Did you observe the coupler on the other car?

A. I do not think I did.

Q. Did you see Shives and Waltman working with this moving car afterwards?

A. Yes sir.

Q. Was all the efforts you saw made there working toward coupling, made on that car?

A. I could not say. They was in between the two cars.

Q. How many efforts did you see them make before they finally coupled it?

A. Three or four; I would not be sure which.

Q. Did they have this piece of wood until this last effort?

A. No sir.

Q. How big a piece of wood was it?

A. I could not tell that. It was a piece of wood about that long, though, I believe (indicates) I could not tell about the width of it. It was wedge shaped. Pointed at one end.

80 Q. You indicated what, about 20 or 24 inches?

A. No, I judge about 16 or 17 inches.

Q. How long did Brinkmeier remain there at the house, do you remember?

A. Well, from the time it happened until the regular passenger train went east that night; he went out on that regular passenger train to Wichita.

Q. At the side of this draw bar or coupling, whatever you call it, it seems to be attached to the car by means of some heavy timbers, on either side, bolted to the car, I will ask you whether you noticed whether the condition of these timbers, on either side of it, as to whether they were worn or not?

A. No, I do not know as I did. The timbers on all cars are worn more or less, and I could not say whether I did or not.

Q. And you could not say whether or not the timbers on this particular car were slivered or worn?

A. No, I could not say.

Q. Would you say that the space on either side of this draw-bar was as much as three inches?

DEFENDANT'S COUNSEL: I object to that as leading and suggestive. The witness said he did not know.

COURT: The objection will be sustained to the question in its present form.

To which ruling of the court plaintiff excepts.

Q. How much space did you notice or observe on the sides of this draw-bar, on this moving car?

A. Well, I do not know as I looked at both sides, to see whether there was space on both sides of the draw-head or not, but on the south side, between there and the timbers I should judge there was pretty plenty of space, but I could not say in inches, whether an inch and a half, or something like that, possibly more.

Q. To refresh your recollection, Mr. Moleneaux, you testified at a former trial, didn't you?

81 A. Yes, sir.

Q. I will ask you if you propounded this question, and whether you made the following answer:

DEFENDANT'S COUNSEL: I object to their laying the foundation to impeach their own witness, leading and incompetent, irrelevant and immaterial, and improper cross-examination of his own witness.

PLAINTIFF'S COUNSEL: Not going to impeach this witness, but refreshing his recollection.

COURT: I think this is a little bit argumentative.

Mr. HARRIS, for Plaintiff: It is not argumentative. It is a settled plactice that you can refresh the recollection of the witness, if he did not now recollect; if it is a fact, and if he did not state so before.

COURT: It is in the nature of cross-examination of his own witness. I will sustain the objection.

To which ruling of the court plaintiff excepts.

Q. I will ask you if you observed in this car, Mr. Moleneaux, whether or not, on the side of this draw-bar there were bolts on the opposite side of the draw bar from you, on the inside of the draft timber, went down through it?

A. I could not say whether the bolts was down through on the inside of the timbers, or whether they went through the timbers; I could not say as to that. It seemed to me though as though the bolts was next to the draw head, but I would not be positive.

Q. I mean the side from you?

A. On both sides.

Q. Not certain as to that?

A. No, sir.

Cross-examination of R. J. MOLENEAUX.

By Mr. BENTON, for defendant:

Q. It is your recollection that the bolts were next to the drawhead?

A. Yes, sir.

Q. The attempt to couple these cars together, consisted in bringing

the cars together; that is the engineer was signalled to back up?

A. Yes, sir.

82 Q. And they did that two or three times, and they did not couple until the conductor or somebody got a sliver of wood, or of some kind, and put by the side of the draw bar?

A. That is what I suppose they did.

Q. That is a sliver he got from a tie, wasn't it?

A. He got it off the waste pile on the side of the track—south side of the track. The ground goes up there about three feet high, I judge, and it was laying there, over on the south side of the land running along the track.

Q. After they put that in, they backed up and it coupled?

A. Yes, sir.

Q. What kind of shoes did Brinkmeier have on?

A. Had on a heavy pair of shoes; top came up about so high, I should think. (Indicates.)

Q. Heavy soles?

A. Good heavy pair of soles on them.

Q. That is all.

83 J. E. CURVEREST, called as a witness on behalf of plaintiff, first being duly sworn testifies as follows:

Direct examination by Mr. FERGUSON:

Q. State your name?

A. J. E. Curverest.

Q. What is your business?

A. Switchman.

Q. How long have you been in that business?

A. About twenty years.

Q. Where are you working now?

A. For the Santa Fe Railroad, Wichita.

Q. How long have you been working for that road?

A. About sirteen years.

Q. What do switchmen do?

A. They handle box cars and switch them around.

DEFENDANT'S COUNSEL: I object as incompetent, irrelevant and immaterial.

COURT: The objection is overruled.

To which ruling of the court, defendant excepts.

A. Handling box cars.

Q. Do they make couplings or uncouplings of cars?

A. Yes, sir.

Q. They are not meant to run out on the roads, but station and terminal points?

A. Yes, sir.

Q. Have to handle and distribute trains?

A. Sometimes, when short of men.

Q. You have been at that business, you say, about 16 years?

A. Yes, sir.

Q. How many times per day, or in a day's service, would you couple cars.
A. All the time.
Q. Would they amount to ten or a hundred per day?
A. Sometimes two hundred.
Q. As much as two hundred per day?
A. Yes, sir.
Q. Have you used automatic couplers?
A. Yes, sir.
Q. I will get you to examine this model, and state if the draw bar attachment for coupling is a fair representation of what is known as automatic couplers?
A. Yes, sir.
84 Q. Whereabouts on these cars are these couplers attached?
A. Under the car.
Q. Attached to the bottom of the car?
A. The bottom.
Q. Attached to the bottom?
A. Yes, sir.
Q. In handling these automatic couplers on cars, do you frequently find these couplers slightly from the center of the cars?
A. Yes, sir.
Q. When you find a coupler slightly from the center of the car, will it make?
A. No, sir.

DEFENDANT'S COUNSEL: I object to that as incompetent and immaterial.
COURT: The objection will be overruled.
To which ruling of the court, defendant excepts.

A. You have got to replace them.
Q. I say when from the center slightly, will they make when brought together?
A. No, sir.
Q. What has to be done with them, if anything——

DEFENDANT'S COUNSEL: I object as incompetent, irrelevant and immaterial.

Q. —So they will couple automatically when brought together?
A. What is that?
Q. When you find them in that condition, what has got to be done, so they will couple automatically when brought together?
A. Replace them in center of the car.
Q. What do you call that, any name for that?
A. No, sir. Only straighten them up again.
Q. Would it be descriptive of the condition to say, to bring them to into line again?
A. Yes, sir.
Q. How do you do that, Mr. Curverest?

DEFENDANT'S COUNSEL: I object to that as incompetent, irrelevant and immaterial, as to what he may do.

Q. How is it done?

DEFENDANT'S COUNSEL: I object to that as incompetent, irrelevant and immaterial.

85 COURT: What you want to know is, how they are lined up generally.

PLAINTIFF'S COUNSEL: Yes, sir.

COURT: The objection will be overruled.

To which ruling of the court defendant excepts.

A. Well, sir, if the draw bar is not in line, line it up with your hands.

DEFENDANT'S COUNSEL: I object to it as to the manner. Of course, I have no objections to the witness stating what is necessary to be done in order to make the coupling but if the idea is as to what a switchman may do, getting it in line, I object to that as being incompetent.

COURT: I suppose what is necessary to do in order to line up.

PLAINTIFF'S COUNSEL: I will not insist upon this but will withdraw it until later.

Q. Now, will you just listen to this question? If there was a standing car on the siding, with the knuckle open, and a car was moving down slowly toward the standing car with the coupler of the moving car slightly out of line from the center and over towards the brakeman in which condition it would require assistance to bring it to alignment in the center of the car, what would be the reasonable and proper method of making this coupling?

DEFENDANT'S COUNSEL: I object to that as incompetent, irrelevant and immaterial, and a question for the jury and not for this witness to determine, not proper subject for expert evidence, and also object to the competency of the witness, and object to it further as not being a proper hypothetical question, or based on the facts of the case.

COURT: The objection will be overruled.

To which ruling of the court defendant excepts.

A. Have to assist it in making it.

86 Q. Tell the jury how that is done?

DEFENDANT'S COUNSEL: I object to that as incompetent, irrelevant and immaterial, not a proper subject for expert evidence, and to the competency of the witness to testify on that subject.

COURT: The objection will be overruled.

To which ruling of the court plaintiff excepts.

A. Well, I assist it with my foot.

DEFENDANT'S COUNSEL: I move to strike that out.

COURT: The motion will be sustained, and the answer stricken out.

To which ruling of the court, defendant excepts.

DEFENDANT'S COUNSEL: I object to that.

COURT: The objection will be sustained. Now, the question is what would be the proper way to do it, not how you would do it, but what would be the proper way to do it.

To which ruling of the court plaintiff excepts.

A. With your foot.
Q. With the foot?
A. With the foot.
Q. Where would the foot be placed, if anywhere on this coupler?
A. On the draw bar.

DEFENDANT'S COUNSEL: I object to that as incompetent irrelevant and immaterial, not a subject of expert evidence, and to the competency of the witness.
COURT: The objection will be overruled.
To which ruling of the court defendant excepts.

A. Against the draw bar.
Q. Whereabouts on the draw bar or coupler, if you can illustrate on this model?

DEFENDANT'S COUNSEL: I object as incompetent, irrelevant and immaterial, and to the competency of the witness.
87 COURT: The objection will be overruled.
To which ruling of the court, defendant excepts.

A. Here. (Indicates on the model.) Well, I do not know what you would call that part of the draw bar.
Q. It has been referred to in this case as the lip of the draw-bar, or guard arm. Is that the piece you refer to?
A. Yes, sir.

DEFENDANT'S COUNSEL: I object to it as incompetent, irrelevant and immaterial.
COURT: This objection will be overruled.
To which ruling of the court defendant excepts.

Q. When would you put the draw bar over?
A. As they came together, I would shoot it far enough——

DEFENDANT'S COUNSEL: I object as incompetent, irrelevant and immaterial.
PLAINTIFF'S COUNSEL: I will withdraw that.

Q. Where should the draw bar be placed?
A. The center of the car.

Cross-examination of J. E. CURVEREST by Mr. BENTON, for defendant.

Q. Are you familiar with the various kinds of automatic couplers by name?
A. No, I am not.
Q. Do you know the Tower automatic coupler?
A. No, I do not think I do. I know that draw-bar there.
Q. Do you know the Hein automatic coupler?
A. No, I do not.
Q. What kind of automatic couplers do you know?
A. The Trojen and the Tower.
Q. I asked you about the Tower?
A. I know about the Tower.

Q. Do they have any foot rests on them?
A. What do you mean?
Q. Why, a place to put the foot. Anything constructed about a Tower coupler,—that is, any place for a foot.
A. Not that I know of.
88 Q. You never heard of an automatic coupler being constructed with something on it to put the foot against, did you?
A. No, sir.
Q. For pushing the coupler one way or the other?
A. No.
Q. A coupler that is out of line a little bit can be moved over with the hand, can it?
A. Yes, sir.
Q. You do that frequently?
A. Yes, sir.
Q. You do not always use your foot?
A. No, sir.
Q. You use your hands a good deal, don't you?
A. Yes, sir.
Q. You have coupled Tower couplers in the Santa Fe Yards?
A. Yes, sir.
Q. Automatic couplers don't have to be exactly in the center of the car, do they, to couple.
A. Do as a rule, yes sir.
Q. They are constructed, so they have a little play?
A. Yes, sir.
Q. So they may be out of line a little?
A. Yes, sir.
Q. So that on your road there is about an inch on each side an inch space on each side of the coupler?

PLAINTIFF'S COUNSEL: I object to that as not proper cross-examination.

A. Yes, sir.

PLAINTIFF'S COUNSEL: I object to that as not proper cross-examination; not bringing any issue in question in this case what the Santa Fe might have on their roads.
COURT: The objection will be sustained.
DEFENDANT'S COUNSEL: That was simply a preliminary question.
PLAINTIFF'S COUNSEL: Cannot be on cross-examination.
COURT: Put your next question.
To which ruling of the court, defendant excepts.

Q. The cars that you have used have been so constructed that the automatic couplers will couple when they are not exactly in the center. Intended to couple that way; so, you do not always find it necessary to put the draw head in the exact center of the car; even if you should see it out of the center a little bit?
89 A. Pretty hard proposition to make a coupling if not just right.

Q. If not right. But as you say, you do not always have put them exactly in the center?

A. They have got to be in the center of the car to be made; may be sometimes a little assistance on the outside can make them.

Q. Suppose they are an inch out of the center?

A. Cannot make them.

Q. Cannot make the couplings?

A. No, sir.

Q. Didn't you say these automatic couplers were made to have them couple without being in the center?

A. Yes, sir.

Q. And they do it?

A. Sometimes.

Q. Haven't you frequently undertaken to make couplings when they were in the center, and they would or would not make?

A. Have to assist them to make.

Q. When in the center?

A. When not exactly in the center.

Q. You mean by assisting that it is necessary, before the cars come together to put the draw heads exactly in the center?

A. Yes, sir.

Q. It may be put in the center in any way convenient?

A. Yes, sir.

Q. And whichever way you would do it, would be to your own convenience.

A. Yes, sir.

Q. And what you say is based on your own experience; what you did do?

A. Yes, sir.

Q. And you know nothing further than that?

A. Yes, sir.

Q. Just based on what you do yourself?

A. Yes, sir; that is it.

Q. That is the only opinion you are giving?

A. Yes, sir.

90 Q. So when you say it is proper to put these couplers in a certain position, in a certain way, you mean you do it that way?

A. Yes, sir.

Q. And some other fellow might do it some other way?

A. Yes, sir.

Q. Some other fellow who might desire to be careful might block it over.

PLAINTIFF'S COUNSEL: I object to it as improper cross examination.

COURT: The objection will be overruled.

To which ruling of the Court plaintiff excepts.

Q. Isn't that true?

A. Yes, sir.

Q. Some switchmen will take more chances than another?

A. Yes, sir.

Q. Some switchmen will try to assist cars when they are coming back quite rapidly, and others will not try it then?
A. Never assist to make couplings until after they hit.
Q. Always let them hit once?
A. Yes sir; sometimes it does and sometimes they miss.
Q. You would not think it proper to put your foot up there before you knew whether going to couple without it?
A. No, sir.
Q. You take that chance as a last resort?
A. Yes, sir.
Q. And so, if you had cars coming down against—some moving cars coming down against standing cars and they hadn't yet come together, and you had the cars yourself, no engine there, you would let them come together first, wouldn't you?

PLAINTIFF'S COUNSEL: I object to that, because that is not based on any question here.
COURT: He has already answered that question once or twice.
To which ruling of the Court defendant excepts.

91 JOHN A. MORGAN, called as a witness on behalf of plaintiff, first being duly sworn, testifies as follows:

Direct examination by Mr. FERGUSON:

Q. Please state your name to the Court, and jury?
A. John A. Morgan.
Q. How old are you?
A. 47.
Q. What has been your business?
A. Railroading.
Q. For how long?
A. About twenty-five years.
Q. Engaged in that business at present?
A. No,sir.
Q. How long since you have been?
A. About eighteen months, I think.
Q. Prior to eighteen months ago when you quit, where were you employed and what company?
A. The Santa Fe at Wichita.
Q. For how long a period?
A. About twelve years.
Q. What were you doing?
A. Braking.
Q. As switchman?
A. Yes, sir.
Q. What are the general duties of a switchman, Mr. Morgan?
A. To handle cars, make up trains, place them where they belong.
Q. Does that include coupling and uncoupling cars?
A. Certainly.
Q. Have you during these years, since automatic couplers came into use, been using them?
A. Yes, sir.

Q. When did they come into use.
A. I do not know; about eight years ago, I judge.
Q. Coming into use about that time?
A. I think so.
Q. Finally got into general use?
A. I think so.
Q. So finally all cars were equipped with them?
A. Yes, sir.
Q. Long before you quit business?
A. Yes, sir.
Q. You say you worked continuously about sixteen years?
A. Twelve years here.
Q. Had you been in business prior to that time at some other point?

A. Yes, sir.

92 Q. How long?

A. I was twenty-five years altogether; switching and braking altogether.

Q. How many couplings of cars would you probably make a day for the period since automatic couplers came into use, approximately?

A. I would have no idea now. I think a hundred would be a good many but if a man says five hundred, I could not tell.

Q. Every day?

A. I think a hundred anyway. I would not want to say.

Q. I mean generally and during what hours?

A. Continuously here at work during sixteen years. Twelve years here in Wichita.

Q. All the periods you were not using automatic couplers, though?

A. Oh, no.

Q. Whereabouts on the cars are these automatic couplers used, Mr. Morgan?

A. Out on the end.

Q. The bottom of the car?

A. Under the end sills. Not always under the end sills. There are same cars with the draw bar coming through the end sills. Very heavy end sills. I think the Pennsylvania have got some. Not many that way.

Q. Sort of a boiler iron structure, they come through. And attach to the bottom sides of the car, all of them, don't they?

A. Yes, sir.

Q. Well, cars equipped with automatic couplers, being brought together to couple, is it necessary to have both knuckles open, or will it couple with one?

A. Couple with one open.

Q. Whereabouts are these couplers as to being in the middle or otherwise, of the car?

A. Supposed to be in the center, and the draw bars are supposed to be in the center of the car.

Q. Have you seen during these years you were switching here, cars, many of them, with these couplers or draw bars slightly out of the center of the cars?

A. Sometimes.

Q. When they are slightly from the center, will they make when brought together?

93 A. Not, if far enough out of line; could be slightly out of line and make.

Q. How much out of line, generally?

A. Oh, I do not know. If the drawbar was an inch, I do not think they would couple.

Q. If it is lopped over—the draw bar lopped over, so the knuckle does not stand up and down, would that prevent its making?

A. I do not think it would make at all, that way?

Q. When you find them in that condition, what, if anything must be done, so they will couple?

A. Well, you would have to block the drawbar, so it will be in better position.

Q. What about alignments?

A. Have to shove it over to where it would make.

Q. Then, these drawbars, if out of line, so would not make, to have them couple, must be brought back to the center of the car?

A. Must be brought back so they will be in line with the center of the car they are approaching.

Q. If there was a car standing on the siding with the knuckle open, and a car was moving slowly down towards the standing car, with the coupler of the moving car slightly from the center of the car and over towards the brakeman, in which condition it would require assistance to bring it to alignment in the center of the car, what would be the reasonable and proper method or methods to make it couple?

DEFENDANT'S COUNSEL: I object to that as incompetent, irrelevant and immaterial, and not proper question for expert evidence, and not a proper hypothetical question.

COURT: The objection will be overruled.

To which ruling of the court defendant excepts.

(Question repeated by counsel, to which same objection is made, with same ruling and exception.)

A. The proper way in my judgment would be to shove that over with the foot.

94 DEFENDANT'S COUNSEL: I object to that.

COURT: The objection will be sustained.

To which ruling of the court, plaintiff excepts.

COURT: The answer will be stricken out to which plaintiff excepts.

A. I say to take your foot and push the draw bar over where it would make, or in alignment, would be the proper method.

Q. Is there any other method known to you?

DEFENDANT'S COUNSEL: I object to that, as incompetent, irrelevant, and immaterial.

COURT: The objection will be overruled.

To which ruling of the court defendant excepts.

PLAINTIFF'S COUNSEL: I will withdraw that, your Honor.

Cross-examination of JOHN A. MORGAN:

By Mr. BENTON, for defendant:

Q. It would depend on a great many circumstances, wouldn't it, whether you used your foot?
A. Why, under some circumstances.
Q. You might use your foot under some circumstances?
A. Yes sir.
Q. It would depend entirely on the facts as they appeared to you at the time?
A. Why, yes.
Q. That is, there isn't established way or ways of doing the things, regardless of circumstances or danger?
A. There are, so far as the moving car is concerned.
Q. Now, if the draw head was out of line a little, do you mean to say you could not put it in line with your hands?
A. Why you could do it, but it is adding danger to danger to do it to a moving car.
Q. You couldn't with your hands?
A. You could but I do not think it would be proper and prudent way to do it.
95 Q. Nothing placed on draw bars for a foothold, is there?
A. No sir.
Q. No preparation for a man to use his foot on an automatic draw bar?
A. No sir.
Q. The reason you say it is a proper thing to do is because you do it, isn't it?
A. Well, no; not exactly. I have seen, I expect hundreds of others do it; it is the rule.
Q. Known of their losing a leg now and then?
A. I do not know that I ever did from that. I do not think of anybody.
Q. You have heard of it frequently?
A. Yes sir.
Q. Then the boys got scared up and quit it for a while?
A. No. No.
Q. Then begin again?
A. No, a small thing like that don't scare them.
Q. Are you one of the kind that is always putting your foot up every time a car was out of line a little bit?
A. Oh, no.
Q. The boys differ about that, don't they?
A. Not very much.
Q. You recognize that there is danger in putting your foot, or hands, in any of these places, do you?
A. I do.
Q. Well, a car will couple with the drawhead out of line a little, with these automatic couplers?
A. Yes sir; I think so.

Q. You say if one of the couplers was over one way an inch and the other over the other way an inch, probably it would not couple?

A. I do not think so.

Q. But one could be out of line an inch, or sometimes more than that, and the other in the center and couple?

A. I think an inch, would make all right; depend then on how hard they hit.

96 Q. Do you always try it first to see if it will couple?

A. Unless the alignment is very bad, I do; unless you see it cannot make. You can, after years of handling cars; you can tell whether it will, standing that way, or not.

Q. If very much out of line, would do it before; but if a little out of line, will let them try it?

A. Yes sir.

Q. And especially try it if not in a hurry?

A. Yes sir, and if you think by the appearance of both drawheads—I think it is the proper thing to let them try it anyhow.

Q. The proper thing to be accomplished, if a drawbar is too far out of line, is to put it in line, isn't it?

A. Yes sir.

Q. And every man who has that to do, judges of all the surrounding circumstances at the time, and you do it sometimes one way and sometimes another?

A. Not on a moving car. I invariably use my foot. If I have got to put the drawbar on a moving car in place, I invariably use my foot.

Q. Suppose one draw bar lops over, so the knuckle stands over?

A. Yes, I understand it.

Q. You said those would not make at all.

A. No they would not, while in that position.

Q. Got to block them up?

A. Yes.

Q. And that ought to be done before you tried to make it; straighten it up first?

A. That would be my way of doing it.

Q. That is the proper way, isn't it?

A. Why, yes, I judge so, if that drawbar was turned. You mean to say turned half over or less?

Q. Twisted over so the knuckle is not straight.

A. It could not make. Have to straighten it in some way.

Q. If it would not stay straightened, you would have to block it in position, before you could expect it to make?

97 A. Yes sir, have to fasten it in that position in some way.

Q. These are not the kind of positions you ever undertake to hold in place with your foot?

A. Oh, no.

Q. Would not repair cars that way?

A. No, if the draw bar was twisted around, I would not try to shove it back again. I might try it, but I do not think I could do it.

Q. It would not be the proper thing to do and you would not expect to do it?

A. No, I do not think I would do that.

Q. Now, it sometimes happens or frequently happens, that drawbars that are not out of line much and apparently all right, do not couple the first time?

A. Oh, yes.

Q. That is, they may be in line and look to be all right, and some little thing, you do not know what is the matter, the first time would not couple, and the next time will?

A. If in line, the latch will go inside of the clutch and still not make—the latch won't shut.

Q. The next time, may couple all right?

A. Yes sir. Give them a "high sign" and couple all right.

Q. You testified to that before, that frequently you tried one, two or three times, and the next time would make all right?

A. Yes sir. I think I said that. If I was asked that, I know I did.

Q. Because it is the truth?

A. Yes sir.

98 Mr. BENTON for defendant: I want to ask Mr. Brinkmeier a few more questions on cross examination before plaintiff rests.

Mr. BRINKMEIER recalled by Mr. Benton for further cross examination.

Q. Mr. Brinkmeier when testifying upon the last trial of this case, in reference to the manner in which your foot was caught between the couplers, didn't you give these answers which I shall read: "Q. The knuckle of the standing car was closed? A. Yes sir. Q. When the cars came together? A. Yes sir. Q. And your foot was against that knuckle? A. Yes sir. Q. The sole of your foot was against that knuckle? A. I do not know. Q. Don't you know? A. My foot was between the face of the knuckle of the standing car and the knuckle guard of the moving car. Q. Wasn't the sole of your foot against the knuckle of the standing car? A. I do not know. Q. Didn't you so testify on the other trial. A. I do not know. Q. Didn't you testify to it more than once on the other trial. A. I cannot recall." Were not these questions asked you on the trial and answers given?

PLAINTIFF'S COUNSEL: I object to that as incompetent, irrelevant and immaterial, and already has been gone over two or three times.

COURT: I think he made no reference to these answers. The objection will be overruled.

To which ruling of the court plaintiff excepts.

A. I cannot recall. I remember telling you that my foot——

Q. I do not care for that. Do you remember giving this testimony on this last trial?

A. No sir, I cannot recall.

Q. This possibly has been testified to: The box car which was standing on the side track was C. B. U. P. car?

A. Yes sir.

99 Q. And the other was Missouri Pacific Salt Car 17555?

A. Yes sir.

Q. That is the car that had the draw head upon which you placed your foot—salt car 17555?

A. Yes sir.

Exhibit "A" introduced in evidence by plaintiff as shown on page 101 of this Case Made is made a part of this Case-Made, is in the words and figures as there shown, and that Exhibit "B" introduced in evidence by defendant on cross-examination as shown on pages 102, 103 and 104 of this Case Made and made a part of this Case Made and is in the words and figures as there shown. That the models of cars marked Exhibit A and B and A. T. & S. F. No. 1725 introduced in evidence referred to in the foregoing testimony of the witneses examined are hereby made a part of this Case-Made.

100 In the District Court of Sedgwick County, Kansas.

HENRY BRINKMYER, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, a Corporation, Defendant.

Application to Amend Petition.

At the conclusion of the introduction of evidence, the plaintiff by his counsel, now asks leave of the Court to amend the amended petition, on which this action is being tried, to conform to the facts proved in this action, and in the words and figures as follows, to-wit:

"Plaintiff alleges that the Missouri Pacific Railway car No. 17555, being the car with which plaintiff was injured was loaded with salt at Hutchinson, in the State of Kansas, on the Missouri Pacific Railway Company's lines, on the 10th day of November, 1900, by the Kansas Hutchinson Salt Co., and said car was by said Missouri Pacific Railway Company conveyed and transported over its line to the Hammett Grocery Company, at Pine Bluff, Arkansas; which said car left Hutchinson on the 12th day of November, 1900, and arrived at Pine Bluff, Arkansas, between the 15th and 18th days of November, 1900, with said cargo of salt. And the said car was used in interstate traffic of commerce by said defendant railway company."

C. V. FERGUSON AND
KOS HARRIS,
Plaintiff's Attorneys.

Filed July 8, 1908.
RAY L. TAYLOR, *Clerk,*
By S. N. BRIDGEMAN, *Deputy.*

101 Mr. BENTON, for defendant: I object to the amendment to the pleadings at this time, for the reason that it is setting forth allegations which are incompetent to be set forth at this time; that it is changing the cause of action set forth in the petition or amended petition on which the case has been tried; that it is setting up an entirely new cause of action, one that is barred by the statute of limitations of this state, and is a departure from the cause of action set forth in the amended petition, and are not allegations which are proper to be inserted in the petition at this time under the practice in this state.

By the COURT: Let the application be overruled.

To which ruling of the Court the plaintiff excepts.

102 In the District Court of Sedgwick County, Kansas.

HENRY BRINKMEYER, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, a Corporation, Defendant.

Now, upon the application of the plaintiff to amend his amended petition to conform to the facts proven, after hearing argument by counsel for both the plaintiff and the defendant, and being fully advised in the premises, the court denies and refuses the application to amend. To which ruling the plaintiff at the time excepted and excepts.

THOS. C. WILSON, *Judge.*

Filed July 8, 1908.
RAY L. TAYLOR, *Clerk,*
By S. N. BRIDGEMAN, *Deputy.*

The above is all the evidence introduced on behalf of plaintiff. Plaintiff rests.

And thereupon the defendant demurred to the evidence introduced on behalf of the plaintiff, which demurrer was in the words and figures following, to-wit:

103 In the District Court of Sedgwick County, Kansas.

No. 21554.

HENRY BRINKMEIER, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Demurrer to Evidence.

Now comes the defendant in open court and after the plaintiff has introduced all his evidence in his behalf in the above entitled

cause, and demurs to the evidence introduced by said plaintiff for the reason that said evidence does not prove a cause of action against this defendant and in favor of said plaintiff.

C. E. BENTON,,
SMYTH & HELM,
Attorneys for said Defendant.

No. 21554. Henry Brinkmeier v. The Mo. Pac. Ry. Co. Demurrer to Evidence. Filed July 8th, 1908. Ray L. Taylor, Clerk.

And thereupon the court after due consideration, and being fully advised, sustained said demurrer, to which ruling of the court plaintiff at the time duly excepted, and excepts.

104 EXHIBIT A.

In the District Court of Sedgwick County, Kansas.

No. 21554.

HENRY BRINKMEIER, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Stipulation.

It is hereby stipulated and agreed by and between the plaintiff and defendant in this cause, that Missouri Pacific Car No. 17555 was loaded with salt at Hutchinson, Kansas, on the Missouri Pacific Company's lines, on the 10th day of November, 1900, by the Kansas Hutchinson Salt Company, and by the Missouri Pacific Railway Company conveyed and transported over its lines of railway to the Hammett Grocery Company of Pine Bluff, Arkansas, leaving Hutchinson, on the 12th day of November, and arriving at Pine Bluff from the 14th to the 17th of November, 1900, with said contents, cargo of salt.

This stipulation is to avoid the necessity of taking depositions, and may be read in lieu of depositions as evidence in this case, but the statements above set forth shall be subject to objections as to the competency and relevancy.

Signed this 19th day of January, 1905.

The above case to be continued until the April, 1905, term.

HENRY BRINKMEIER,
By C. V. FERGUSON,
Attorney for Plaintiff.
THE MISSOURI PACIFIC RY. CO.,
By DAVID SMYTH,
C. E. BENTON,
Attorneys for Defendant.

Filing on back. "Ex. A." 21554. Henry Brinkmeier, vs. Mo. Pac. Ry. Co. Stipulation. Filed Jan 19, 1905, Geo. A. Clark, Clerk S. N. B. Deputy.

105 EXHIBIT B.

Statement of Henry Brinkmeier.

ST. LOUIS, Mo., *January 30th,* 1901.

Q. State your name, age and residence?
A. Henry Brinkmeier, age 32 last September, Wichita, Kas.
Q. How long have you been in the employ of the Company?
A. Since September, 1899.
Q. State date and hour of accident?
A. About 3:00 o'clock P. M., November 12th, 1900.
Q. What kind of weather, clear or stormy?
A. I am not positive as to the character of the weather.
Q. The place of accident?
A. Hutchinson, Kansas, on the long siding opposite the main line. No grade.
Q. Number of the train and engine.
A. We were the switching crew. Engine No. 917.
Q. How many cars were you handling?
A. Five or more.
Q. Please give the names of your train crew, or the men working with you in this switching.
A. W. H. Waltman, conductor; John Murray, engineer, Henry Brinkmeier and J. Shives, switchmen, C. Walters, fireman.
Q. Between what cars were you injured?
A. I don't know the numbers but was hurt between system cars.
Q. Please state fully how this accident occurred, and what you were doing when it happened, and where you were at the time of the accident.
A. I was riding the cut of cars on the siding. There were five or six cars. They were given a kick and I took charge of them, and as they were coming towards the other cars they were running at a speed between three and four miles an hour I should judge—they were going about as fast as a man could walk. I had Janny draw bar up on the car that was standing still. They don't open
106 very far; that kind of a coupler to my knowledge. I got off the cars two car lengths, I suppose, before I came to my cars, ran around in front and tried to get the knuckle open on the car which was moving ; walked ahead of it, but couldn't open it; the knuckle was open as far as that kind of a coupling could open, or that kind of a draw bar. It has been my trouble, and everybody's, as near as I know. The American drawbars are continuous drawbars, which pulls the drawbars over to one side or the other and it must be assisted one way or the other in order to make an automatic work; the drawbar was on my side of the car; as we were coming to the cars I put my right foot against the draw bar of the

moving car; the draw-bar on the car standing still being in proper position; the Janny which was open then did not go in automatically as it ought; it knocked my foot down and caught it, crushing my right foot through the arch between the draw-bars.

Q. The car whose drawbar you kicked or pushed, was it on the car which was moving or on the car standing still?

A. It was on the car moving.

Q. Then the car which was standing still had the same kind of equipment on it as the car which was moving?

A. Yes—automatic draw bars.

Q. Are these cars so provided that when they come together they ought to couple?

A. They are supposed to.

Q. All these cars were equipped with automatic couplers?

A. Yes.

Q. Who else was on this switching cut?

A. Nobody.

Q. Was there any inspection made of the coupling appliances?

A. I do not know.

107 Q. What kind of draw bars were the care equipped with?

A. One of these cars was equipped with a Janny drawbar and my recollection is that was on the car which was standing still and the car against which I put my foot was a Tower or Trojan.

Q. Was there any inequality in height?

A. Whether there was any inequality of height or not, I do not know.

Q. What physician at Hutchinson was called?

A. Dr. Sedlinger, Local Surgeon at Hutchinson was called. The result of the injury was my right leg was amputated betwen the ankle and knee joint.

Q. Was there any other person involved in this accident except yourself?

A. I was the only person present that I know of.

Q. Who do you personally blame for the accident?

A. I blame the automatic drawbars because they were not in proper working order. There was no defect about them except the knuckle opened just as far as a Janny would open; the drawbar on the moving car was away over to my side, which I held over with my foot as far as it could be held; it is done every day in the week.

Q. What is done every day in the week?

A. What I did there; it then would not go into the automatic place which it is supposed to do.

HENRY BRINKMEIER.

108 And be it known that the proceedings were had in said cause and the findings, rulings and orders made and final judgment rendered therein by the court, as shown and set forth in the following duly and regularly prepared journal entry filed therein on the 8th day of July, 1908, and duly spread on the proper records of said court in the office of the clerk thereof, in words and figures following, to-wit:

109 In the District Court of Sedgwick County, Kansas.

No. 21554.

HENRY BRINKMEIER, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Journal Entry.

Now, on this 8 day of July, 1908, that being a day of the regular April, 1908, term of the district court within and for the county of Sedgwick and State of Kansas, the above entitled cause came on for trial, plaintiff appearing in person and by C. V. Ferguson and Kos Harris, his attorneys, and said defendant appearing by C. E. Benton and Smyth & Helm, its attorneys, and a jury being waived by the parties, said cause was tried to the court.

Whereupon said plaintiff introduced all evidence in his behalf and rested his case.

And thereupon said defendant duly filed its demurrer to the evidence introduced in behalf of said plaintiff, and for ground of demurrer alleges that said evidence does not prove or show a cause of action in favor of said plaintiff and against said defendant: and the court being fully advised, finds that said demurrer should be sustained.

It is therefore considered, ordered and adjudged by the court that said demurrer be and the same is hereby sustained and this case dismissed and that said defendant have and recover of said plaintiff its costs herein, taxed at $113.75, to all of which findings, orders and judgments, said plaintiff at the time duly excepted and excepts.

THOS. C. WILSON, *Judge.*

Filed July 8, 1908.

RAY L. TAYLOR, *Clerk,*
By S. N. BRIDGEMAN, *Deputy.*

110 And thereupon, on the court's sustaining the demurrer interposed by the defendant, the plaintiff filed a motion for a new trial, and on this 8th day of July, 1908, and on the day of the trial of this cause, and during the term at which this cause was tried, which was in the words and figures as follows, to-wit:

In the District Court of Sedgwick County, Kansas.

HENRY BRINKMEIER, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Motion for New Trial.

Now comes the plaintiff and moves the court to set aside and vacate this decision and finding and set aside its order sustaining the demurrer interposed by the defendant and grant to said plaintiff a new trial of this action for the following reasons which affect materially his substantial rights, to-wit:

I.

Irregularity in the proceedings of the court by which said plaintiff was prevented from having a fair trial.

II.

Certain rulings and orders made by the court by which said plaintiff was prevented from having a fair trial.

III.

Abusive discretion by the court by which plaintiff was prevented from having a fair trial.

IV.

Irregularity in the proceedings of the prevailing party defendant, by which plaintiff was prevented from having a fair trial.

V.

Misconduct of the prevailing party, defendant herein.

VI.

Error in the assessment of the amount of the recovery, same being too small.

111 VII.

Said finding, ruling and decision of the court is not sustained by sufficient law and evidence.

VIII.

That said verdict, ruling and finding of the court is contrary to law.

IX.

Errors of law occurring at the trial and excepted to by said plaintiff at the trial.

C. V. FERGUSON AND
KOS HARRIS,
Attorneys for Plaintiff.

Filed July 8, 1908.

RAY L. TAYLOR, *Clerk,*
By S. N. BRIDGEMAN, *Deputy.*

112 And be it further remembered that afterwards and on the same day, to-wit, the 8th day of July, 1908, at the April term of said court and at the same term of said court at which said cause was tried, and said demurrer interposed by the defendant was sustained, and within the time required by law said cause came duly and regularly on for hearing on the motion of the plaintiff for a new trial therein, parties appearing by counsel as before, and the court having heard the argument of counsel, and being fully advised in the premises, and found said motion not well taken and same should be overruled, *and* did then and there overrule plaintiff's motion for a new trial, to which ruling of the court refusing to grant new trial and overruling plaintiff's motion for a new trial, plaintiff did then and there duly except. And thereupon and on the said 8th day of July, 1908, the court rendered judgment against the plaintiff and in favor of the defendant for the costs of this action taxed at $113.75, to all of and each of which findings, rulings, judgments and order the said plaintiff at the time duly excepted and excepts.

THOS. C. WILSON, *Judge.*

Filed July 8, 1908.

RAY L. TAYLOR, *Clerk,*
By S. N. BRIDGEMAN, *Deputy.*

113 In the District Court of Sedgwick County, Kansas.

HENRY BRINKMEIER, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Stipulation.

It is hereby stipulated and agreed between the respective parties hereto on this 8th day of July, A. D. 1908, at the conclusion of the above entitled cause, that the Case-Made of this cause now prepared by plaintiff and examined by the defendant *and* found to be correct, and defendant has no suggestions of any amendments, and that the same may be presented to the Honorable Thomas C. Wilson, Judge of the District Court of Sedgwick County, Kansas, who tried said cause and by him signed and settled as a Case-Made in this cause.

That the defendant herein waives the delivery of the Case-Made to the Clerk of the court or to the defendant and waives time in which to suggest amendments, waives the giving of notice of the making and serving of this Case-Made and waives proof of service of the Case-Made or notice of service, and waives the giving of notice of the time of signing and settling said Case-Made, and the same shall be signed and settled by the Judge who tried the case and filed and attested by the clerk of this court.

C. V. FERGUSON AND
KOS HARRIS,
Attorneys for Plaintiff.
C. E. BENTON AND
SMYTH & HELM,
Attorneys for Defendant.

Filed July 8, 1908.

RAY L. TAYLOR, *Clerk,*
By S. N. BRIDGEMAN, *Deputy.*

114 The foregoing shows a full, true and correct statement of all pleadings, motions, demurrers, orders, findings, rulings, judgments, evidence, objections, exceptions, entries, and proceedings upon which judgment was rendered in the above entitled case.

115 In the District Court of Sedgwick County, Kansas.

No. 21554.

HENRY BRINKMEIER, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Certificate of Case-Made.

I, the undersigned, Thomas C. Wilson, Judge of the District Court of Sedgwick County, Kansas, hereby certify, that the above and foregoing was presented to me as Case-Made in the action above entitled, the plaintiff appearing by C. V. Ferguson and Kos Harris, his attorneys, and the defendant appearing by Smyth & Helm and C. E. Benton its attorneys, and it appearing that said defendant has waived all notice of time and place of settling said Case-Made and has by stipulation on file and by statement in open court, that the defendant has no amendments to suggest to the same and has consented that Case-Made be settled and signed as made and I, having duly examined same and finding said Case-Made to be correct in every respect, *and* I now settle and sign the same as true and correct Case-Made and direct that it be attested and filed with the Clerk of said court.

Witness my hand at Wichita, in Sedgwick County, Kansas, this 8th day of July, A. D. 1908.

[SEAL.]

THOS. C. WILSON,
Judge of the District Court of Sedgwick County, Kansas.

Attest:

RAY L. TAYLOR,
Clerk of the District Court,
By S. N. BRIDGEMAN, *Deputy.*

Filed Jul- 8, 1908.

RAY L. TAYLOR, *Clerk.*
S. N. BRIDGEMAN, *Deputy.*

Filed Jul- 11, 1908.

D. A. VALENTINE,
Clerk Supreme Court.

116 Be it further remembered, that on Saturday, the 6th. day of November 1909, the same being one of the regular judicial days of the July Term of the Supreme Court of the State of Kansas, said court being in session at its court room in the city of Topeka, the following proceeding was had and remains of record at page — of Journal "NN" of said court in words and figures as follows, to-wit:

117 No. 16090.

HENRY BRINKMEIER, Plaintiff in Error,
vs.
THE MO. PAC. R'L'Y CO., Defendant in Error.

Journal Entry of Judgment.

This cause comes on for decision; thereupon it is ordered and adjudged that the judgment of the court below be affirmed. It is further ordered that the plaintiff in error pay the costs of this case in this court taxed at $—, and hereof let execution issue.

118 Be it further remembered, that on the same day, to-wit the 6th day of November 1909, there was filed in the office of the clerk of the supreme court of the state of Kansas, the Syllabus and opinion of the court in the above entitled cause, which syllabus and opinion are in the words and figures as follows, to wit:

119 No. 16090.

HENRY BRINKMEIER
v.
THE MISSOURI PACIFIC RAILWAY COMPANY.

Error from Sedgwick County.

Affirmed.

Syllabus by the Court.

MASON, *J.:*

1. A written stipulation as to the existence of certain facts entered into by the parties to an action for the express purpose of avoiding the necessity of taking depositions, the agreement being that the statements contained may be read in lieu thereof, subject to objections as to competency and relevancy, does not enlarge the issues made by the pleadings or operate as a waiver of any omission therein.

2. The several sections of the act of Congress of 1893 (ch. 196, p. 531, 27 U. S. Stat. at L.) making it unlawful for railroad companies engaged in interstate commerce to use cars not equipped with certain specified appliances, are framed upon the same general plan and notwithstanding any minor differences in their language, a declaration by the Supreme Court of the United States that one of them is intended to impose upon the carrier the absolute duty of keeping in good repair the equipment therein required, irrespective of any question of negligence, determines that a like interpretation is to be given to the others. The first paragraph of the syllabus in Railway Co. v. Brinkmeier, 77 Kan. 14, overruled.

All the Justices concurring.

A true copy.
Attest:

____ ____,
Clerk Supreme Court.

120 The opinion of the court was delivered by MASON, *J.:*

On November 12, 1900, in or near the city of Hutchinson, Kansas, Henry Brinkmeier, a brakeman in the employ of the Missouri Pacific Railway Company, was injured while engaged in coupling cars. He sued the company, alleging that his injury was occasioned by various defects in the defendant's equipment, and recovered a judgment, which was reversed by this court on two grounds, namely, that an instruction had been given relating to the federal safety appliance act, which was not in accordance with the interpretation which this court placed thereon, and that the petition did not allege violation of that statute as it existed when the accident occurred. (Railway Co. v. Brinkmeier, 77 Kan. 14.) Upon a new trial, on July 8, 1908, the plaintiff asked leave to amend his petition by adding averments which this court had held to be necessary in

order to bring the case under the federal law. The request was denied and a demurrer to his evidence was sustained. He brings this proceeding to review these rulings.

The defect in the petition, regarded as an attempt to state a cause of action under the act of Congress, was its failure to allege that the car having the defective coupling apparatus which caused the plaintiff's injury was "used in moving interstate traffic." The provision in force at the time of the injury read:

"It shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact; and which can be uncoupled without the necessity of men going between the ends of the cars." (Sec. 2, Act of March 2, 1893; 27 U. S. Stat. at L. page 531.)

The amendment of 1903 provided that:

"The provisions and requirements * * * relating to * * * automatic couplers * * * shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad en-
121 gaged in interstate commerce, and in the Territories and the District of Columbia, and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith." (Sec. 1, Act of March 2, 1903; 32 U. S. Stat. at L. page 943.)

The petition contained no allusion whatever to interstate commerce except in a statement that the defendant was a corporation doing business as a railway company "as a common carrier into and through the counties of Sedgwick and Reno in the state of Kansas and into the states of Colorado Nebraska, Missouri, Arkansas, Texas, Oklahoma and Indian Territory." This was a sufficient allegation that the company was engaged in interstate commerce and warrants the inference that the car in question was used on a railroad over which interstate commerce was conducted. Therefore the facts pleaded would have constituted a good cause of action under the letter of the law as it now stands. But prior to the amendment of 1903 the statute did not apply to any car excepting those "used in moving interstate traffic." There was nothing in the petition to suggest even remotely that the car the defective equipment of which caused the plaintiff's injury was so used. Therefore, as decided at the former hearing, the petition stated no cause of action under the federal statute. It is urged however that the court should have allowed an amendment. The statute of limitation had barred an action based upon the act of Congress before leave to amend was asked. It was then too late for such an amendment, under repeated decisions of this court, of which the earliest is A. T. & S. F. Rld. Co. v. Schroeder, 56 Kan. 731, where it was said:

"A plaintiff cannot deprive a defendant of the benefit of the statute of limitations by ingrafting upon a case commenced in time another cause of action barred by the statute. * * * The statute of limitations, as applied to such new cause of action, treats the action as commenced when the amendment was incorporated into

the pleadings, and not as begun when the action itself was commenced." (Syllabus.)

In 1905 a stipulation was signed and filed in the case
122 stating facts showing that the car at the time of the injury was being used in interstate commerce, and this is relied upon as supplying the omission of the petition. The stipulation expressly recited that it was made to avoid the necessity of taking depositions, adding that it might be read in lieu thereof, but that its statements should be subject to objections as to competency and relevancy. An agreement so made could not enlarge the issues made by the pleadings. Its purpose, as clearly indicated by its recitals, was merely to obviate the inconvenience and expense of taking depositions. It had no function except as a substitute for the testimony of witnesses, and even if made before the statute of limitation had run could not have operated as a waiver of any defect in the petition.

The considerations already stated are determinative of the case and require an affirmance of the judgment, for the evidence did not warrant a recovery independent of the federal statute. Nevertheless the circumstances give occasion to consider the other question presented—the meaning of that statute. Section 2 makes it unlawful for any common carrier engaged in interstate commerce by railroad "to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars." Two views have been taken of this provision by courts that have had occasion to construe it. One view is that Congress intended to require railroad companies to equip their cars with automatic couplers, but that when this had been done a company was to be liable for an injury resulting from a failure of the device to work, only in case such failure was due to some negligence on its part according to the ordinary rules. The other view is that the intention was to do away altogether with the common law rule making liability depend upon negligence, and to make the carrier absolutely liable for any injury resulting from the use of a car the couplers of which did not in fact
couple automatically by impact, even although their failure
123 to do so was not occasioned by any negligence on its part, and could not have been prevented by any practicable degree of diligence. When this case was here before this court adopted the first stated of these two views, upon grounds set out in the opinion. Since then however an expression of the federal Supreme Court seems to have committed that tribunal to the other. In St. Louis & Iron Mountain Ry. v. Taylor, 210 U. S. 281, a construction was placed upon that part of the safety appliance law which provides for the fixing of a standard height of drawbars for freight cars, and forbids the use in interstate traffic of any cars "which do not comply with the standard." In the opinion it was said:

"The evidence showed that the drawbars which, as originally constructed, are of standard height, are lowered by the natural effect of proper use; that in addition to the correction of this tendency

by general repair, devices called shims, which are metallic wedges of different thickness, are employed to raise the lower draw bar to the legal standard; and that in the caboose of this train the railroad furnished a sufficient supply of these shims, which it was the duty of the conductor or brakeman to use as occasion demanded. On this state of the evidence the defendant was refused instructions, in substance, that if the defendant furnished cars which were constructed with draw bars of a standard height, and furnished shims to competent inspectors and trainmen and used reasonable care to keep the draw bars at a reasonable [the standard?] height, it had complied with its statutory duty, and, if the lowering of the draw bar resulted from the failure to use the shims, that was the negligence of a fellow servant, for which the defendant was not responsible. In deciding the question thus raised, upon which the courts have differed (St. Louis & S. F. Ry. v. Delk, 158 Fed. Rep. 931), we need not enter into the wilderness of cases upon the common law duty of the employer to use reasonable care to furnish his employé reasonably safe tools, machinery and appliances, or consider when and how far that duty may be performed by delegating it to suitable persons for whose default the employer is not responsible.

In the case before us the liability of the defendant does not
124 grow out of the common law duty of master to servant. The Congress, not satisfied with the common law duty and its resulting liability, has prescribed and defined the duty by statute. We have nothing to do but to ascertain and declare the meaning of a few simple words in which the duty is described. It is enacted that 'no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard.' There is no escape from the meaning of these words. Explanation cannot clarify them, and ought not to be employed to confuse them or lessen their significance. The obvious purpose of the legislature was to supplant the qualified duty of the common law with an absolute duty deemed by it more just. If the railroad does, in point of fact, use cars which do not comply with the standard, it violates the plain prohibitions of the law, and there arises from that violation the liability to make compensation to one who is injured by it. It is urged that this is a harsh construction. To this we reply that, if it be the true construction, its harshness is no concern of the courts. They have no responsibility for the justice or wisdom of legislation, and no duty except to enforce the law as it is written, unless it is clearly beyond the constitutional power of the lawmaking body. It is said that the liability under the statute, as thus construed, imposes so great a hardship upon the railroads that it ought not to be supposed that Congress intended it. Certainly the statute ought not to be given an absurd or utterly unreasonable interpretation leading to hardship and injustice if any other interpretation is reasonably possible. But this argument is a dangerous one, and should never be heeded where the hardship would be occasional and exceptional. It would be better, it was once said by Lord Eldon, to look hardship in the face than break down the rules of law. But when applied to the case at bar the argument of hardship is plausi-

ble only when the attention is directed to the material interest of the employer to the exclusion of the interests of the employé and of the public. Where an injury happens through the absence of a safe draw bar there must be hardship. Such an injury must
125 be an irreparable misfortune to some one. If it must be borne entirely by him who suffers it, that is a hardship to him. If its burden is transferred, as far as it is capable of transfer, to the employer, it is a hardship to him. It is quite conceivable that Congress, contemplating the inevitable hardship of such injuries, and hoping to diminish the economic loss to the community resulting from them, should deem it wise to impose their burdens upon those who could measurably control their causes, instead of upon those who are in the main helpless in that regard. Such a policy would be intelligible, and, to say the least, not so unreasonable as to require us to doubt that it was intended, and to seek some unnatural interpretation of common words." (Pages 294-295-296.)

It is true that that case involved only section 5 of the law, relating to the height of draw bars, while the present one involves only section 2, relating to automatic couplers, and there is enough difference in the language of the two sections to afford ground for a reasonable distinction. But the whole act either has for its purpose merely the regulation of the character of appliances to be used—the forms of mechanical devices to be employed—or it has a broader scope and is designed as well to shift the burden of accidental, non-negligent injuries occurring in connection with such appliances, from the injured employee, where the common law placed it, to the employer, in accordance with the modern theory that as a matter of legislative policy losses arising from injuries to workmen resulting from the use of complicated machinery should be counted as a part of the cost of production or operation. In declaring that "the obvious purpose of the legislature was to supplant the qualified duty of the common law with an absolute duty deemed by it more just" the Supreme Court characterizes the whole act as one cast in the larger mold. Its interpretation is authoritative and final. It follows that the instructions originally given by the district court as to the effect of the federal statute were correct. But as the stat-
126 ute of limitation had barred an action under the federal law before an attempt was made to amend the petition so as to show that the case fell within that act as it existed when the injury occurred no recovery by the plaintiff is possible.

The judgment for the defendant is therefore affirmed.

All the Justices concurring.

A true copy.

Attest:

____ ____,

Clerk Supreme Court.

127 SUPREME COURT,
State of Kansas, ss:

I, D. A. Valentine, clerk of the supreme court of the state of Kansas, do hereby certify that the above and foregoing is a true, full, complete and correct transcript of the record and proceedings in the case of Henry Brinkmeier, plaintiff in error vs. The Missouri Pacific Railway Company, defendant in error and also of the opinion of the court rendered therein, as the same now appears on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Topeka, Kansas, this January 31st, 1910.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk of the Supreme Court of Kansas.

128 Here follows, the original petition for a writ of error, the original writ of error and the allowance thereof, a copy of the appeal and supersedeas bond, the original assignments of error and prayer for reversal, and the original citation with the return of service acknowledged by the attorneys for the defendant in error.

129 In the Supreme Court of the State of Kansas.

No. 16090.

HENRY BRINKMEIER, Plaintiff in Error,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant in Error.

Petition for Writ of Error from the Supreme Court of the State of Kansas to the Supreme Court of the United States.

To the Supreme Court of the United States:

Comes now, Henry Brinkmeier, plaintiff in error, who, feeling himself aggrieved by the final judgment of the Honorable Supreme Court of the State of Kansas, in the above entitled action, on the 6th day of November, A. D. 1909, wherein and whereby it was adjudged by said Supreme Court that the judgment of the District Court of Sedgwick County, Kansas, in a certain action wherein Henry Brinkmeier was plaintiff, and The Missouri Pacific Railway Company was defendant, and same was upheld and affirmed, to the injury of this petitioner.

That said Supreme Court of the State of Kansas is the highest court of said State in which a decision in this action could be had. In the said action, rights, privileges and immunities, were claimed by your petitioner under the constitution and statutes of the United States and under the authority exercised under the United States,

and the decisions of the said Supreme Court of the State of Kansas was against the rights, privileges and immunities set up and claimed under said constitution, statutes, and authority, especially the Act of Congress of March 2nd, 1893.

130 And your petitioner does hereby appeal from said judgment in said action and therefore desires to avail himself of the law and practice in such cases made and provided, by writ of error, that his petition for said appeal be allowed and granted, and that such proper orders may be made to the end that a true and correct transcript of the record, proceedings, papers, and documents, upon which and by reason of which said judgment was made, duly attested and authenticated, may be transmitted as by law provided, to the Supreme Court of the United States, sitting at Washington, District of Columbia. Assignment of Errors accompany this petition.

And your petitioner will ever pray.

HENRY BRINKMEIER,
By C. V. FERGUSON,
KOS & V. HARRIS,
His Attorneys of Record.

131 [Endorsed:] 16090. Brinkmeier, Plff. in Error vs. Mo. Pac. Ry. Co., Deft. in Error. Petition for Writ of Error. Filed Jan. 13, 1910. D. A. Valentine, Clerk Supreme Court.

132 In the Supreme Court of the State of Kansas.

No. 16090.

HENRY BRINKMEIER, Plaintiff in Error,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant in Error.

Order Allowing Writ of Error.

Comes now Henry Brinkmeier, on this 13th day of January, A. D. 1910, and files, and presents to this court his petition praying for an allowance of the writ of error intended to be urged by him; and praying further that a duly authenticated transcript of the records, proceedings and papers upon which judgment herein was rendered, may be sent to the Supreme Court of the United States; and that such other and further proceedings may be had in the premises as may be just and proper.

And upon consideration of the said petition, this Court desiring to give petitioner an opportunity to test in the Supreme Court of the United States, the questions therein presented, it is ordered by this Court that Writ of Error be allowed as prayed; provided, however, that the said Henry Brinkmeier give bond according to law, in the sum of $500, said bond to be approved by the Chief Justice of this Court.

In testimony whereof, witness my hand this 13th day of January, A. D. 1910.

W. A. JOHNSTON,
Chief Justice of the Supreme Court of the State of Kansas.

133 [Endorsed:] 16090. Brinkmeier, Plff. in Error vs. Mo. Pac. Ry. Co., Deft. in Error. Order allowing Writ of Error. Filed Jan. 13, 1909. D. A. Valentine, Clerk Supreme Court.

134 In the Supreme Court of the State of Kansas.

No. 16090.

HENRY BRINKMEIER, Plaintiff in Error,

v.

THE MISSOURI PACIFIC RAILWAY COMPANY, a Corporation, Defendant in Error.

Writ of Error.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Supreme Court of Kansas:

Because, in the records and proceedings, as also the rendition of a judgment in a plea which is in the said supreme court of Kansas, before you, at the November sitting of the July term, 1909, thereof, between Henry Brinkmeier, plaintiff, vs. The Missouri Pacific Railway Company, a corporation, defendant, a manifest error has happened, to the great damage of said plaintiff, Henry Brinkmeier as by his complaint and petition appears. We being willing that error, if any has been, should be duly corrected, and full and speedy justice done, to the parties aforesaid in this behalf do command you, if judgment be therein given, that then, under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Supreme Court, together with this writ, so that you have the said record and proceedings aforesaid, at the city of Washington, D. C. and filed in the office of the clerk of the United States Supreme Court on or before thirty days from the date hereof, to the end that the record and proceedings aforesaid being inspected, the United States Supreme Court may cause further to be done therein, to correct that error, what of right, and according to the laws and customs of the United States should be done.

135 Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 15th day of January, A. D. 1910.

Done in the City of Kansas City, with the seal of the Circuit Court of the United States for the District of Kansas attached.

[The Seal of the Circuit Court of the United States, District of Kansas. 1862.]

GEO. F. SHARITT,
Clerk Circuit Court United States,
District of Kansas.

Allowed:

W. A. JOHNSTON,
Chief Justice of the Supreme Court,
State of Kansas.

136 [Endorsed:] 16090. Henry Brinkmeier, Plff. in Error, vs. Mo. Pac. Ry. Co., Deft. in Error. Writ of Error. Filed Jan. 17, 1909. D. A. Valentine, Clerk Supreme Court.

137 In the Supreme Court of the State of Kansas.

HENRY BRINKMEIER, Plaintiff in Error,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant in Error.

Bond on Writ of Error.

Know all Men by these Presents: That we, Henry Brinkmeier, as principal, and C. E. Denton of Harper County and C. V. Ferguson of the county of Sedgwick and State of Kansas, as sureties, are held and firmly bound unto the above named The Missouri Pacific Railway Company, in the sum of Five Hundred Dollars—said bond to be approved by the Chief Justice of this Court—to be paid to it, and for the payment of which well and truly to be made, we bind ourselves, and each of us, and our heirs, executors and administrators, jointly and severally, firmly by these presents.

Whereas, The above named, Henry Brinkmeier, plaintiff in error, seeks to prosecute his Writ of Error, in the Supreme Court of the United States, to reverse the judgment rendered in the above entitled action, by the Supreme Court of the State of Kansas.

Now, therefore, the condition of this obligation is such, that if the above named plaintiff in error shall prosecute his writ of error to effect, and answer all costs and damages that may be adjudged, if he shall fail to make good his plea, then this obligation to be void; otherwise, to remain in full force and virtue.

Sealed with our seals, and dated this 13th day of January, A. D. 1910.

C. E. DENTON.
C. V. FERGUSON.

138 STATE OF KANSAS:
Sedgwick County, ss:

C. E. Denton and C. V. Ferguson each being duly sworn upon oath, depose and say:

That they are each of lawful age, citizens of Sedgwick County, State of Kansas, and are each worth more than the sum in such bond specified as the penalty thereof, free and above all their just debts and liabilities, in property not by law exempt from execution in this State.

C. E. DENTON.
C. V. FERGUSON.

Subscribed and sworn to before me this 13th day of January, A. D. 1910.

[SEAL.] ELLA MORGAN,
Notary Public.

My commission expires Sept. 10, 1911.

This bond approved this 13th day of January, A. D. 1910.

W. A. JOHNSTON,
Chief Justice of the Supreme Court of the State of Kansas.

Endorsed: 16090. Brinkmeier, Pl'ff in Error, vs. Mo. Pac. Ry. Co., Deft. in Error. Bond on Writ of Error. Filed Jan. 13, 1910. D. A. Valentine, Clerk Supreme Court.

139 In the Supreme Court of the State of Kansas.

No. 16090.

HENRY BRINKMEIER, Plaintiff in Error,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant in Error.

Assignment of Errors on Writ of Error.

In the Supreme Court of the United States.

Comes now Henry Brinkmeier, Plaintiff in Error herein and avers and shows that in the records and proceedings in said cause, the Supreme Court for the State of Kansas erred, to the grievous injury and wrong of the plaintiff in error herein, and to the prejudice and against the rights of the plaintiff in error, in the following particulars, to-wit:

I.

That the Supreme Court of the State of Kansas erred in affirming the ruling of the District Court of Sedgwick County, Kansas, sustaining the demurrer of the defendant to the amended petition of the plaintiff, upon which the cause was tried.

II.

That the Supreme Court of the State of Kansas erred in affirming the judgment of the District Court of Sedgwick County, Kansas, in the above entitled action.

III.

That the Supreme Court of Kansas erred in holding that plaintiff's amended petition on which said cause was tried, did not state a cause of action in favor of the plaintiff and against the defendant.

IV.

That the Supreme Court of the State of Kansas erred in deciding that the petition upon which the cause was tried did not state a cause of action under the Federal Statutes of March 2nd, 1893.

140 V.

That the Supreme Court of the State of Kansas erred in holding that the Statute of Limitations had barred the action based upon the Act of Congress of March 2nd, 1893.

VI.

That the Supreme Court of the State of Kansas erred in holding that the plaintiff, plaintiff in error herein, was not entitled to amend his petition on his application, made at the trial of the cause in the District Court of Sedgwick County, Kansas.

VII.

That the Supreme Court of the State of Kansas erred in not reversing the judgment of the trial court, and in not giving to plaintiff in error his rights under the Statutes and laws of the United States in the controversy in this action.

Wherefore, For these and other manifest errors, appearing in the record, the said Henry Brinkmeir, plaintiff in error, prays that the judgment of the Said Supreme Court of the State of Kansas, be reversed and set aside and held for naught, and judgment be rendered for plaintiff in error, granting him his rights under the Statutes and laws of the United States, and plaintiff in error also prays judgment for his costs.

HENRY BRINKMEIER,
By C. V. FERGUSON,
KOS & V. HARRIS,
His Attorneys.

141 [Endorsed:] 16090. Brinkmeier, Plff. in Error, vs. Mo. Pac. Ry. Co., Deft. in Error. Assignment of Errors. Filed Jan. 13, 1910. D. A. Valentine, Clerk Supreme Court.

142 In the Supreme Court of the State of Kansas.

HENRY BRINKMEIER, Plaintiff in Error,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant in Error.

Citation.

The United States of America to the Missouri Pacific Railway Company, Greeting:

Whereas, Henry Brinkmeier has lately appealed to the Supreme Court of the United States, from the judgment lately rendered in the Supreme Court of the State of Kansas, against him, and in favor of you, and said Henry Brinkmeier has filed security as required by law, and has perfected his appeal, as required by law, you are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the City of Washington, in the District of Columbia, thirty days from and after the day this citation bears date, pursuant to a Writ of Error filed in the Clerk's office *for* the Supreme Court of the State of Kansas, wherein Henry Brinkmeier is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment, orders, and rulings rendered against said plaintiff in error as in said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf, to do and receive what may appertain to justice which may be done in the premises.

143 Witness, the Honorable William A. Johnston, Chief Justice of the Supreme Court of the State of Kansas, at Topeka, Kansas, this 13th day of January, A. D. 1910.

W. A. JOHNSTON,
Chief Justice of the Supreme Court of the State of Kansas.

Attest:

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk Sup. Ct.,
By D. L. ARMSTRONG, *Deputy.*

I, the undersigned attorney of record for the defendant in error in the above entitled cause, hereby acknowledge service of the above citation, and enter appearance for said defendant in error, in the Supreme Court of the United States. January 17th, 1910.

DAVID SMYTH,
A. E. HELM,
Attorney- of Record for Defendant in Error.

144 [Endorsed:] 16090. Brinkmeier, Pl'ff in Error, vs. Mo. Pac. Ry. Co., Def't in Error. Citation. Issued Jan. 13th, 1910. Returned Jan. 19, '10. Filed Jan. 19, 1910. D. A. Valentine, Clerk Supreme Court.

145 *Certificate of Lodgement.*

SUPREME COURT, STATE OF KANSAS, *ss:*

I, D. A. Valentine, clerk of the said court, do hereby certify that there was lodged with me as clerk on January 13th, 1910, in the case entitled Henry Brinkmeier, plaintiff in error, v. The Missouri Pacific Railway Company, defendant in error.

1. The original bond of which a copy is herein set forth.

2. Two copies of the writ of error, as herein set forth,—one for *each* defendant, and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Topeka, Kansas, this 31st day of January, A. D. 1910.

D. A. VALENTINE,
Clerk of the Supreme Court of Kansas.

[Seal Supreme Court, State of Kansas.]

146 UNITED STATES OF AMERICA,
Supreme Court of Kansas, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Kansas, in the City of Topeka, this 31st day of January, 1910.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk of the Supreme Court of Kansas.

Endorsed on cover: File No. 22,016. Kansas Supreme Court. Term No. 206. Henry Brinkmeier, plaintiff in error, vs. The Missouri Pacific Railway Company. Filed February 10th, 1910. File No. 22,016.

In the Supreme Court

of the United States

October Term, 1911.

Office Supreme Court
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JAMES H. McKE

Henry Brinkmeier,.....Plaintiff in Error
vs.
The Missouri Pacific Railway Company, ...Defendant in Error
} No. 206

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

Statement of the Case, Specification of Errors, Brief and Argument for Plaintiff in Error.

KOS HARRIS and V. HARRIS, Of Counsel.

C. V. FERGUSON, Attorney for Plaintiff in Error.

THE McCORMICK PRESS, WICHITA.

In the Supreme Court
of the United States

October Term, 1911.

Henry Brinkmeier,.....Plaintiff in Error
vs.
The Missouri Pacific Railway
Company, ...Defendant in Error
} No. 206

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

Statement of the Case, Specification of Errors, Brief and Argument for Plaintiff in Error.

STATEMENT OF THE CASE.

This suit was brought by plaintiff in error, as plaintiff, against the defendant in error, a corporation, as defendant, in the District Court of Sedgwick County, Kansas, by petition filed December 4th, 1901. (Rec. pp 4-7)

On December 21, 1901, the defendant filed a motion to make the petition more definite and certain, which was thereafter on the 11th of January, 1902, overruled. (Rec. pp 7-8)

On January 27, 1902, the defendant answered: first, denying generally and specifically, each and every allegation of the petition; second, that the injuries and damages claimed to have been sustained by the plaintiff, if any, were sustained and were caused by the carelessness and negligence of the plaintiff, and without fault on the part of the defendant. (Rec. p 9)

On June 2, 1902, plaintiff replied by denying generally and specifically the statements and allegations contained in the answer designated as Second. (Rec. p 10)

Afterwards the case was tried in said District Court of Sedgwick County, Kansas, by the court, with the jury, and the verdict of the jury was given for the plaintiff for $6500.00, which being followed by final judgment, the case was taken by appeal by the defendant to the Supreme Court of Kansas, where the judgment of the trial court was reversed. The Supreme Court of Kansas in reversing the judgment of the lower court, among other things found as a matter of law, that, "A railway company doing business as a common carrier engaged in Inter-State Commerce has complied with the requirements of the Act of Congress relating to Safety appliances enacted March 2, 1893, (21 U. S. Stat. at L. p 531) and its amendments of 1903 (32 U. S. Stat. at L. p 943) when it equips its cars with automatic couplers as prescribed by such Act, and it will not, therefore, be subject to the conditions imposed by Section 8 of such enactment on ac-

count of subsequent defects in the couplers which ordinary care and diligence could not have avoided.

"A petition contained an averment which reads: 'The Missouri Pacific Railway Company is and was at all the times hereinafter mentioned, a corporation * * * doing business as a railway company, as a common carrier, in, into and through the counties of Sedgwick and Reno in the State of Kansas, and into the States of Colorado, Nebraska, Missouri, Arkansas, Texas, Oklahoma and Indian Territory.' Held, that it was not error to admit evidence thereunder showing that such railway company was engaged in Inter-State Commerce." 77 Ks. p 14.

The case was again tried on the 8th day of July, 1908, in the District Court of Sedgwick County, Kansas, before the court without a jury. The plaintiff adduced evidence in support of his petition, which was the same as offered on the former trial. (Rec. pp 11-70)

The plaintiff introduced in evidence the following which goes directly to the questions passed upon and now in controversy in this appeal, to-wit:

"It is hereby stipulated and agreed by and between the plaintiff and defendant in this cause, that Missouri Pacific car 17555 was loaded with salt at Hutchinson, Kansas, on the Missouri Pacific Company's lines, on the 10th day of November, 1900, by the Kansas Hutchinson Salt Co., and by the Missouri Pacific Railway Company conveyed and transported over its lines of railway to the Hammett Grocery Co., of Pine Bluff, Ark., leaving Hutchinson, on the 12th day of November, and arriving at Pine Bluffs from the 14th to 17th of November, 1900, with said contents, cargo of salt. This stipulation is to avoid the necessity of taking depositions and may be read in lieu of depositions as evidence in this case, but the statements above set forth shall be subject to objections as to

the competency and relevancy. Signed this 19th day of January, 1905." (Rec. p 72)

Plaintiff testified as follows:

Q. From what point to what point were you running, while working for the Missouri Pacific?

A. Wichita and Hutchinson.

Q. Would you go from Wichita to Hutchinson and back the same day?

A. Yes, sir.

Q. Did you receive an injury while working for this company?

A. Yes, sir.

Q. When?

A. The 12th day of November, 1900.

Q. Where did it occur?

A. Hutchinson, Kansas. (Rec. pp 12-13)

Q. In what capacity were you working at that time; conductor or brakeman?

A. As brakeman.

Q. What were the duties of a brakeman, Mr. Brinkmeier?

A. Setting and releasing brakes; coupling and uncoupling cars, loading and unloading merchandise at stations; anything to help and assist to run the train.

Q. What were the numbers and letter on that car, Mr. Brinkmeier?

A. 17555 Missouri Pacific salt car.

Q. What kind of a car was that; box car or flat car?

A. Salt car. Similar to a box car.

Q. Closed car, is it?

A. Yes, sir.

Q. When you went around to the head of this car, westward, for what purpose did you go there?

A. To see the condition of the couplers.

Q. State in what condition you found the couplers of this draw-bar on this moving car when you went there.

A. I found the knuckle closed and the draw-bar lopped over to one side towards me and from the center of the car.

Q. You see this model sitting here in front of you;

I will ask you if this portion attached to this model that swings on a hinge that I am unable to open, is that the part you refer to as the knuckle?

(Shows by opening and closing knuckle of model.)

A. Yes, sir.

Q. This attachment to this model that I now indicate here, that is what you call the coupling, is it?

A. Yes, sir.

Q. Attached to the body of the car?

A. Yes, sir.

Q. And the forward part of it, that seems to be able to swing, is what you call the knuckle?

A. Yes, sir.

Q. What did you do with that coupling when you went around there?

A. I found the knuckle closed.

Q. Did you attempt to open it?

A. And I attempted to open the knuckle.

Q. What did you do?

A. Failed to open the knuckle. I pushed the coupler over to the center of the car .

Q. Well, did you take hold of the rods that are here, for the purpose of releasing the fastenings and open this coupling?

A. Yes, sir.

Q. State where this rod that runs from the side of the car in to the coupler, where is it attached to the car?

A. It was attached on the end of the car.

Q. Was it under the car like this one, or up on the side of the car?

A. Up on the end of the car?

Q. Did you take hold of that?

A. Yes, sir.

Q. Did the fastening that holds the knuckle in there release?

A. No, sir.

Q. What, if anything, did you do then?

A. I went forward to the standing still car.

Q. I will ask you if these couplers are designed to work automatically?

A. Yes, sir, they are.

Q. That is, they are what is called automatic couplers?

A. Yes, sir.

Q. Where are these couplers placed on cars, as to being in the center, or otherwise, of the cars?

A. The couplers are placed underneath the car and in the center of the car.

Q. Will these couplers couple when brought together, unless in the center of the car?

A. No, sir.

Q. What was the name of the coupler on the moving car, if you know?

A. Tower coupler.

Q. What kind of coupler on the standing car, to which you were going to couple, if you know?

A. Hein.

Q. You say you pushed this draw bar over to the center of the car?

A. Yes, sir.

Q. Which way did you push it; from the side you had come from?

A. Yes, sir.

Q. It was over then, towards you?

A. Yes, sir. Over towards me and I pushed it over toward the center of the car with my hand.

Q. What did it do?

A. It came back.

Q. Then you went forward?

A. Yes, sir.

Q. What kind of car was this that was standing on the sidetrack, that you went to; flat car, or box car?

A. Box car off the Central Branch. A system car, off the Central Branch.

Q. When these couplers are about to be used, in what position is it necessary to place them so they will couple, as to whether the knuckle is open or closed?

A. One knuckle must be open in order for cars to couple automatically.

Q. Do they couple with one open?

A. Yes, sir.

Q. When you were attempting to open the knuckle on the moving car, how far apart were the moving cars?

A. About one car length.

Q. When you went to the standing car you say you opened the knuckle of that car?

A. Yes, sir.

Q. After you opened this knuckle on the standing car, what did you do?

A. I took hold of the hand hold on the end of the standing car.

Q. Where was this moving car at that time?

A. About a half car length away.

Q. Coming towards you?

A. Yes, sir.

Q. What did you do with the coupler on the moving car, if anything, as they were about to come together?

A. I placed my foot against the coupler of the moving car and placed it to the center of the car, so that it would couple.

Q. Did the coupling make when these cars came together?

A. No, sir.

Q. What happened to these couplers?

A. The knuckle of the standing still car closed, and the coupler of the moving car "past" the coupler of the standing still car away from me.

Q. Where did the draw bar and knuckle that was closed on this moving car finally stop on the standing car, or the coupler on the standing car?

A. Over to one side from me.

Q. Did it slip by?

A. Yes, sir.

Q. The coupler on the standing car?

A. Yes, sir.

Q. Where was your foot caught? State if your foot was caught in these couplers?

A. Yes, sir.

Q. Where was your foot in these couplers. What part was it between?

A. It was between the lip of the draw bar and the outer edge of the knuckle of the standing car.

Q. You mean by the lip that part of the coupler you had put your foot against?

A. Yes, sir.

Q. What you mean by the lip is this portion?

A. Yes, sir.

Q. Did you see anything about this coupler before it came together that indicated that it would not couple when coupled up?

Defendant's Counsel: That is objected to as a leading question.

Court: That is pretty suggestive. The objection will be sustained, to which ruling of the court plaintiff excepts.

Q. Did this draw-bar, I mean the draw-bar on the standing car pass the draw-bar on the standing car to you, or from you, did you say?

A. The coupler on the moving car passed the coupler on the standing still car over from me.

Q. Show the court with this model where your foot was caught and where the coupler of the moving car finally stopped against this coupler of the standing still car?

Defendant's Counsel: Would you use these cars, so we will both use the same cars?

Plaintiff's Counsel: I have never been able to see that your couplers were made in proportion—They are out of proportion, I believe to the coupler used; but still, we will try it at present.

Defendant's Counsel: You have only got one car there.

Q. Take this pencil and indicate just where your foot was caught, between what points, or pieces of this coupler, and show the court how the knuckle, as you stated, on the moving car was closed.

A. The knuckle on the standing car closed. I had opened it and the coupling of the moving car passed that of the standing still car, over from me and my foot was caught between this part, as I said, the lip of the coupler, and this part here of the standing still car. (Indicates on model.)

Q. You mean the inside of the face of the knuckle that had closed on the standing still car?

A. Yes, sir.

Q. Take these two cars that appear to have automatic couplers, and show the court what position they occupied when they stopped, and where your foot was, if you can?

A. (Shows with models.) As these cars came together, this knuckle closed, and this moving car passed this coupler of the standing still car over in this position; over here, and my foot between this point there, and this point here.

(Rec. pp 14-17)

R. J. MOLENEAUX testified on behalf of plaintiff, as follows:

Q. Who, if any person, came to the point where Brinkmeier was injured, until you took him to the house?

A. Why, there was Harve-Waltman, Judge Shives, a fellow by the name of Walstrome, Will Walty, and I don't know whether the engineer was down there or not, but I know these parties were there.

Q. Members of this train crew, except Walstrome?

A. Yes, sir.

Q. He was a passerby?

A. Yes, sir.

Q. Was there anything between you and these cars or Mr. Brinkmeier from the time you observed him until the time you went to him to obstruct your view?

A. Some small trees in the yard.

Q. Could you see plainly what was going on?

A. Yes, sir.

Q. What, if anything, if you know, was done with these cars, after Mr. Brinkmeier was taken over to the house?

A. Why, they were coupled up and pulled out of there, I believe.

Q. Who, if any one, tried to make the coupling, or made the coupling?

A. The other brakeman and the conductor, Shives and Harvey Waltman.

Q. Did you see Shives make an effort to couple it?

A. Yes, sir.

Q. Did he succeed?

A. No, sir.

Q. Then did conductor Waltman join him in some other efforts?

A. Yes, sir.

Q. Describe to the jury what they did, if anything, with this coupling on this moving car, if anything, to have it couple?

A. Well, I could not say, any more than they made an attempt to couple the cars and they did not couple and when they did couple them finally, they was kicked down below me some distance, and I did not stand right where I could see what they did do.

Q. Did you see them get any piece of wood or anything to use?

A. Yes, sir.

Q. Who got that?

A. Harvey Waltman.

Q. Where did he go with it?

A. In between the cars.

Q. Which one did he seem to be working with: the standing or moving car?

A. I could not see which one.

Q. Did you see the standing car when you went up there?

A. Yes, sir.

Q. Did you observe the draw-bars and couplers?

A. Why, I looked at it.

Q. Describe the condition of that coupler on the moving car, as you saw it, when you went up there?

A. Why, you mean the drawhead?

Q. Yes.

A. Why, the drawhead seemed as though it would lay over to the south side of the car, and the knuckle instead of being up straight like that, would be lopped over like that, on the moving car.

Q. How about the opening that held the drawbar in these cars here at the end. Did it fit up? You say it lopped. You mean in that attitude?

A. Yes, sir.

Q. Was there any apparent unusual space around that drawbar?

Defendant's Counsel: I object to that as incompetent and asking for an opinion.

Court: The objection is sustained.

To which ruling of the court, plaintiff excepts.

Q. State whether or not you observed whether there was any space around this drawbar.

A. Yes, sir. There was pretty plenty of space there.

Q. Which side did it appear to be on?

A. I could not say as to that.

Q. You did not make that critical an examination?

A. No, sir, I did not.

Q. From what you saw of the space there, would this drawbar turn over in the hole?

Defendant's Counsel: I object to that.

Court: It will be sustained, unless qualified.

To which ruling of the court, plaintiff excepts.

Q. State whether or not, after examining it, if it had space to play sideways and up and down?

A. Yes, sir, I think it had plenty of room in there.

Q. Was that space great enough so the drawbar could have been turned over in its fastenings?

Defendant's Counsel: I object to that as incompetent, and asking for an opinion.

Court: It is sustained.

To which plaintiff excepts.

Q. How much space was there in the draw head around that car?

A. I could not tell exactly.

Q. Approximately, as you saw it?

A. I could not tell myself, how much space is required in there, but it looked to me as if there was all kinds of room in there.

Q. Think it could play up and down and sideways?

A. Yes, sir, both ways.

Q. Did you observe the coupler on the other car?

A. I do not think I did.

Q. Did you see Shives and Waltman working with this moving car afterwards?

A. Yes, sir.

Q. Was all the efforts you saw made there working toward coupling, made on that car?

A. I could not say. They was in between the two cars.

Q. How many efforts did you see them make before they finally coupled it?

A. Three or four; I would not be sure which.

Q. Did they have this piece of wood until this last effort?

A. No, sir.

Q. How big a piece of wood was it?

A. I could not tell that. It was a piece of wood about that long, though, I believe (indicates). I could not tell about the width of it. It was wedge shaped. Pointed at one end.

Q. You indicated what, about 20 or 24 inches?

A. No, I judge about 16 or 17 inches.

Q. How long did Brinkmeier remain there at the house, do you remember?

A. Well, from the time it happened until the regular passenger train went east that night; he went out on that regular passenger train to Wichita.

Q. At the side of this draw bar or coupling, whatever you call it, it seems to be attached to the car by means of some heavy timbers, on either side, bolted to the car, I will ask you whether you noticed whether the condition of these timbers, on either side of it, as to whether they were worn or not?

A. No, I do not know as I did. The timbers on all cars are worn more or less, and I could not say whether I did or not.

A. And you could not say whether or not the timbers on this particular car were slivered or worn?

A. No, I could not say.

Q. Would you say that the space on either side of this draw-bar was as much as three inches?

Defendant's Counsel: I object to that as leading and suggestive. The witness said he did not know.

Court: The objection will be sustained to the question in its present form.

To which ruling of the court, plaintiff excepts.

Q. How much space did you notice or observe on the sides of this draw-bar, on this moving car?

A. Well, I do not know as I looked at both sides, to see whether there was space on both sides of the draw-head or not, but on the south side, between there and the timbers I should judge there was pretty plenty of space, but I could not say in inches, whether an inch and a half, or something like that, possibly more.

Q. To refresh your recollection, Mr. Moleneaux, you testified at a former trial, didn't you?

A. Yes, sir.

(Rec. pp 54-57)

The foregoing testimony by the plaintiff and the witness Moleneaux shows substantially, and it is uncontradicted, that the plaintiff was in the employ of the Missouri Pacific Railway Company as a brakeman running between the city of Hutchinson and Wichita, Kansas; that on the day of the accident, November 12th, 1900, the plaintiff was in the discharge of his duties as a brakeman and with other employes of the defendant company they were handling the defendant company's car 17555, which had been loaded with salt by the Kansas Hutchinson Salt Co., of Hutchinson, Kansas, consigned to the Hammett Grocery Co., of Pine Bluff, Ark. This car with others had been brought from the salt works to the yards of the defendant company in Hutchinson when plaintiff attempted to adjust the coupling on this car, so that it would couple by impact when brought against another car, both of which were equipped with what are

commonly known as automatic couplers. The coupler on this salt car was in such condition that it would not and did not couple automatically by impact when the cars were brought together, by reason of which, plaintiff was injured while attempting to adjust these couplers. The coupler on the salt car was in such condition that when the cars were brought together it passed the coupler on the other car, injuring the plaintiff. After this, other members of the train crew made two or more unsuccessful efforts to couple these cars, and they were finally coupled after employing a piece of timber forced in beside the coupler on this salt car to hold it in position until the coupling was effected.

At the conclusion of introduction of evidence in the trial of this cause before the District Court of Sedgwick County, Kansas, plaintiff asked leave of the court to amend his petition, on which the case was then being tried, to conform with the facts proven, in the words and figures as follows, to-wit: "Plaintiff alleges that the Missouri Pacific car 17555, being the car with which plaintiff was injured, was loaded with salt at Hutchinson in the State of Kansas on the Missouri Pacific Railway Company's lines on the 10th day of November, 1900, by the Kansas Hutchinson Salt Co., and said car was by said Missouri Pacific Railway Company conveyed and transported over its line to the Hammett Grocery Co., at Pine Bluff, Ark., which said car left Hutchinson on the 12th day of November, 1900, and arrived at Pine Bluff, Ark., between the 15th and 18th day of November, 1900, with said cargo of salt. And the said car was used in Inter-State traffic of commerce by said defendant railway company." (Rec. p 70)

To this, defendant interposed objection and the court overruled the application. (Rec. p 71)

The defendant interposed a demurrer to the evidence introduced by the plaintiff, for the reason that said evidence did not prove a cause of action against the defendant in favor of the plaintiff. The court sustained the demurrer to the evidence, to which ruling of the court the plaintiff at the time excepted. (Rec. pp 71-72)

The court rendered judgment dismissing the action and gave judgment for the costs in the case taxed at $113.75. (Rec. p 75)

From this judgment plaintiff prosecuted an appeal to the Supreme Court of Kansas, and on consideration, that court affirmed the judgment of the lower court. (Rec. pp 80-84)

This being a final judgment in the highest court of the State of Kansas, plaintiff sued out a writ of error and citation to this court.

It is claimed by the plaintiff in error that he was entitled to recover in this action under the Act of Congress of March 2, 1893, and this without any amendment to his petition on which the case was tried which he asked to make at the conclusion of his testimony at the trial, which was permissible under the procedure in Kansas.

This statement of the case will be followed by specifications of errors, then a brief and argument.

SPECIFICATION OF ERRORS.

Plaintiff in error assigns the following errors of the

Supreme Court of the State of Kansas in the determination by it of this case:

I.

That the Supreme Court of the State of Kansas erred in affirming the ruling of the District Court of Sedgwick County, Kansas, sustaining the demurrer of the defendant to the amended petition of the plaintiff, upon which the cause was tried.

II.

That the Supreme Court of the State of Kansas erred in affirming the judgment of the District Court of Sedgwick County, Kansas, in the above entitled action.

III.

That the Supreme Court of Kansas erred in holding that plaintiff's amended petition on which said cause was tried, did not state a cause of action in favor of the plaintiff and against the defendant.

IV.

That the Supreme Court of the State of Kansas erred in deciding that the petition upon which the cause was tried did not state a cause of action under the Federal Statutes of March 2nd, 1893.

V.

That the Supreme Court of the State of Kansas erred in holding that the Statute of Limitations had barred the action based upon the Act of Congress of March 2nd, 1893.

VI.

That the Supreme Court of the State of Kansas

erred in holding that the plaintiff, plaintiff in error herein, was not entitled to amend his petition on his application, made at the trial of the cause in the District Court of Sedgwick County, Kansas.

VII.

That the Supreme Court of the State of Kansas erred in not reversing the judgment of the trial court, and in not giving to plaintiff in error his rights under the statutes and laws of the United States in the controversy in this action.

Plaintiff in error prays this court to reverse the judgment and remand the case for a new trial.

BRIEF AND ARGUMENT.

This court will not consider the mere application of settled principles of law to the facts peculiar to a particular case, the importance of which is limited to litigants engaged in it, or to a small class of litigants; yet rules of law must be evolved from facts, and the far-reaching effect of this decision and its widespread importance can be appreciated only by a consideration of the facts shown by the evidence in this case together with the declarations of law made by the Supreme Court of the State of Kansas in its opinion. We, therefore, respectfully ask this court to consider a full analysis of the opinion of the Supreme Court of Kansas in this case in connection with the facts from which that opinion is evolved. When that opinion is analyzed it will show that the application of this opinion to the facts of this case established a rule of law that is not only unsound,

employing the narrowest construction of the Act of Congress of March 2, 1893, but is at variance in effect with that in force in every other court, state or federal, so far as we know.

It must be conceded that the defendant railway company was engaged in inter-state commerce, and that the plaintiff was injured in the discharge of his duties, by reason of the defendant company not having its car equipped with automatic couplers that would couple by impact, as required by the Act of Congress March 2, 1893. This does not seem to be questioned by the Supreme Court of Kansas in its decisions. Neither is it denied that this injury could not have been avoided by compliance with that law.

We contend that by every intendment, and a reasonable interpretation of the matter alleged in the petition, it sufficiently warns the defendant that it must meet a claim under the Safety Appliance Act.

The petition sufficiently shows (1) that the defendant was an inter-state carrier, operating its lines in several states; (2) that it was handling a car on its line; (3) that this car had a coupling apparatus that the defendant had permitted to become unautomatic; (4) that by reason of the defective coupling apparatus attached to the car, it was necessary for the plaintiff to go between two cars to assist the coupling of the cars, and (5) that in doing so his foot was crushed in the impact of the cars.

The petition shows that the defendant used on its lines in the prosecution of its business, a car whose coupling equipment was in clear violation of the Act of Congress.

The only federal case which we have been able to find which seems to be directly in point on the question of the sufficiency of the pleading is the case of Voelker vs. Chicago etc. Ry. Co., 116 Fed. 867. That case has been cited as a precedent on several points, and is entitled to be called a leading case. Its pronouncement on the question of pleading has never been overruled, and is not inconsistent with any of the points decided by this, and other federal courts. The decision of the Circuit Court was reversed on one point by the Court of Appeals, but the reason of Judge Shiras on the interpretation of the pleading was left undisturbed and uncriticised.

In the Voelker case the Court of Appeals mentions two facts, in the disjunctive, that may be averred in connection with averments of a defective coupler, either of which are sufficient to bring the case under the control of Congress. The language of the opinion is, "The case falls short of coming within the Act of Congress only in that the petition does not allege the inter-state character of the commerce in which defendant was engaged, or of the traffic which the car was moving."

The petition in the Voelker case alleged that the defendant was a Wisconsin corporation, "engaged in operating a line of railway through the State of Iowa," while the petition in the present case alleges that defendant is a Missouri corporation, "doing business as a railway company, as a common carrier into and through the counties of Sedgwick and Reno in the State of Kansas, and into the States of Colorado, Nebraska, Missouri, Arkansas, Texas, Oklahoma and Indian Territory."

In overruling the motion for a new trial in the Voelker case, Judge Shiras said: "The general rule invoked by the defendant that a plaintiff, to recover, must

bring his proof within the allegations of his petition or declaration is not questioned, but the real inquiry is whether there was such a departure between the case declared on in the petition, and the case made by the evidence, that the latter will not fairly support the former."

After quoting at length the allegations of the petition as to the cause of the injury, the opinion lays down the rule for interpretation in the following language:

"Certainly the allegations of the petition were sufficient to give notice to the defendant that it was charged with negligence, in that it was using a car upon which the coupler was in such condition that it would not work properly, and would not couple by impact. * * * * Charging the defendant with negligence was charging that the company had not met or fulfilled the duty imposed upon it by law with respect to having and keeping the coupler upon the car in proper condition for use. * * * Therefore, when the petition charged the defendant with negligence with respect to the coupler upon the car, the defendant must have known that, as the car was used in inter-state traffic, the Act of Congress would necessarily come into consideration in defining the obligation resting upon the defendant company."

Among the contentions of defendant was one in the following language:

"It was a mistake to instruct that if the jury believed the car was brought from Illinois to Iowa, then defendant, in transporting it, was engaged in inter-state commerce. This, we submit would be an assumption of the fact to be alleged and proved, i. e., that the car had been used in moving inter-state commerce."

Commenting on this contention the learned Judge reasons and concludes as follows:

"If by this contention it is meant to assert that in order to come within the purview of the Act it must be

shown that at the time of the accident the car was loaded with freight which had been brought from another state, the answer is that the evidence proved such to be the fact in this case. But, further, that is not the proper construction of the Act. The statutes, state and federal, requiring railway companies to equip their cars with automatic couplers were not enacted to protect the freight transported therein, but for the protection of the life and limb of the employes who were expected to handle these cars. The beneficent purpose of these statutes is defeated if the employes are required to handle cars not equipped as required by the statutes, without regard to the question whether the cars are loaded or not. Legislation on this matter of the use of automatic couplers was sought and obtained from Congress, as well as from the state legislature, so that the companies would not be afforded a loophole for escape from liability on the theory that the agencies used in inter-state commerce are without the control of the state legislation. When companies, like the defendant in this case, are engaged in inter-state traffic, it is their duty, under the Act of Congress, not to use, in connection with such traffic, cars that are not equipped as required by that Act. This duty of proper equipment is obligatory upon the company before it used the car in connection with inter-state traffic, and it is not a duty which only arises when the car happens to be loaded with inter-state freight. It frequently happens that the railway companies load cars with live stock or farm produce in the Western States and carry the same to the eastern markets, and then return these cars without a load; but it cannot be true that on the eastern trip the provisions of the Act of Congress would be binding upon the company, because the cars were loaded, but would not be binding upon the return trip, because the cars are empty. Whenever cars are designed for inter-state traffic, the company owning or using them is bound to equip them as required by the Act of Congress; and when it is shown, as it was in this case, that a railway company is using the car for transportation purposes between the two States, sufficient is shown to justify the court in ruling that the Act of Congress is applicable to the situation."

The Supreme Court of Kansas, speaking of the averment in the petition respecting the inter-state character of the defendant's business, says that the averment was a "sufficient allegation that the company was engaged in inter-state commerce, and warrants the inference that the car in operation was used on a railroad over which inter-state commerce was conducted," and would have been sufficient under the amendment of 1903. But as under the law of 1893, the statute did not apply to any car, excepting those "used in moving inter-state traffic," and there was nothing in the petition, in the view of the court, to suggest, even remotely, that the car in question was so used. The omission was held fatally defective, though the evidence showed conclusively that such was the fact.

This raises a question what was the necessity or propriety of saying anything about the defendant as an inter-state carrier? If the language of the statute is to be given a narrow interpretation, and a case is made by alleging simply that the car was used in moving inter-state traffic, and a case for congressional control can be made on paper in no other way, then it is immaterial what the character of the defendant's business was. The matter could have been stricken out on motion as irrelevant, unless an intrastate road can use a prohibited car, though moving inter-state traffic.

If the allegation of the inter-state character of defendant's business was a proper and necessary averment, then the plaintiff had the right to prove it by any testimony in his power that tended to prove the issue, and this was conclusively done by the stipulation, for in the stipulation it is admitted that the lines of the defendant

railway line extended from Hutchinson, Kansas, to Pine Bluff, Arkansas; it was proved that the car was a salt car, and the stipulation admits that it was loaded with salt.

In the Voelker case, the Circuit Court of Appeals, not questioning the soundness of the view of the Circuit Court on the sufficiency of the petition, chose to put its decision on the ground that the evidence which was admitted without objection brought the case under the Act of Congress. What would have been the result if the evidence had been objected to is not stated. The decision was also based on the fact that the railroad carrier was engaged in inter-state commerce, which was established by the fact that it was using an inter-state car on its line. However this may be, there is no doubt that in the case at bar the petition showed that the defendant was engaged in inter-state business, and was using the car in question on its line of railway, and that it had a defective coupler.

Whether the Supreme Court of Kansas based its decision on the failure to make the proper allegation in the petition, or on the inadmissibility of the stipulation in evidence, a question arises whether the Supreme Court was justified in ignoring the stipulation as a part of the evidence in the case.

The following proceedings appear of record: (Transcript p. 11)

Mr. Ferguson: Plaintiff offers in evidence stipulation in this case, entered into on the 19th day of January, 1905, filed in this case on the same day, as follows:

Mr. Benton: Defendant objects to this as incompetent, irrelevant and immaterial under the pleadings in this case.

Court: This is the same stipulation entered before?

Mr. Ferguson: Yes, sir.

By the court: The objection will be overruled, to which ruling of the court, defendant excepts.

Stipulation read in evidence by Mr. Feguson, for plaintiff, copy hereto attached, marked "Ex. A." (Rec. p. 72)

If the objection was founded on an alleged defect in the petition, it should have been so stated, and the defect pointed out. There is no rule of practice better settled than that an objection must be specific, and a general objection that evidence is incompetent or irrelevant is no objection at all, and may and should be ignored by the court, and the evidence considered as admitted without objection.

This point was settled in a very early case in Kansas and has been followed ever since in that state.

Walker vs. Armstrong, 2 Ks. 197, 220.

In that case the court says:

"Parol evidence of the filing of the bonds required by the ferry company was inadmissible. The bond should have been produced, or a case made for giving secondary evidence of its contents. But the exception appearing upon the records is too general to be available. It does not show on what ground Walker objected to the reception of the evidence. It might be on the ground that it was not the best evidence, or it might be on other and untenable grounds.

"Had this objection been placed on the ground that the bond was the best evidence, it might have been obviated by production of the bond.

"The point made in the petition in error, that the court erred in admitting any evidence concerning the filing of the bond, is of the same character. Had the counsel stated when he made the objection, as he now

argues, that the allegation of the bill in regard to filing the bond was insufficient, the court might have allowed an amendment if it was deemed necessary."

Following Walker vs. Armstrong, the question again came up, in which Justice Brewer delivered the opinion.

Railway Co. vs. Cutter, 19 Ks. 83, 87.

The question arose on the admission of a record which was not legally authenticated. When offered in evidence the record was objected to "as being incompetent." Afterwards a motion was made to strike out the record "as being incompetent evidence." Finally an instruction was asked in reference to the fact sought to be proved by the record, "that there was no evidence, etc." The objections were held to be nugatory. "The idea of course is," says the learned Justice, "that as this court simply reviews the rulings of the district court, it should be made clear to us what these rulings were. A party should not be permitted to try his case upon one series of questions in that court, and upon another in this. If upon every question to which the attention of that court was directed it ruled correctly, with what propriety is it said that it erred, and for its errors the judgment must be reversed?"

Conversely, with what propriety can the Supreme Court affirm the judgment of the district court? It compels the trial court to sustain a demurrer to evidence, on a rule of law erroneously laid down for its guidance, and when compelled to recede from its position, seeks to avoid the incongruity of affirming its own errors, by interposing a point not in the case on the plaintiff's appeal.

The question of the sufficiency of the petition was

not before the Supreme Court, because the district court made no decision on that question. The sufficiency of the petition was never challenged, at any stage of the proceedings, either by demurrer, motion or objection.

K. P. Ry. Co. vs. Cutter, 19 Ks. 83, 87.
E & C Rld Co. vs. Lawrence, 29 Inl. 622.
McBride vs. Hartwin, 2 Ks. 405, 410.

The error, if any, in admitting the stipulation in evidence, was not before the appellate court. It was the plaintiff's appeal, and the ruling was in his favor. The defendant did not appeal, and his exception could not be considered.

The only question properly before the Supreme Court was the ruling of the District Court sustaining the demurrer to the evidence, and in passing upon such a demurrer the appellate court, on an appeal by the plaintiff is bound to consider all the evidence, whether rightfully or erroneously admitted by the trial court.

Atwell vs. Grant, 11 Md. 101.

The failure to object to evidence at all, or at the proper time, or in a proper manner, is a waiver of the grounds of objection and the right to subsequently question the admissibility of the evidence.

Hunt vs. U. S., 61 Fed. 795.
Benson vs. U. S., 146 U. S., 325.

Evidence which is in the case by virtue of a failure to make a proper objection to its admission must be considered and allowed its full force.

Lamb vs. Taylor, 67 Md. 85, 8 Atl. 760.
People vs. Smith, 121 Cal. 355, 53 Pac. 802.
Levin vs. Russell, 42 N. Y. 251.
Jones vs. Mobile & G. R. Co., 55 Ga. 122.

Peters vs. Gracin, 110 Cal. 89, 42 Pac. 455.
Livermore etc. Ins. Co. vs. Gunther, 116 U. S. 113.

Evidence which has been admitted without objection is evidence in the case, and must be treated as such in the appellate court, though it would have been rejected as inadmissible if properly objected to.

Atwell vs. Grant, 11 Md. 101.
Farmers Bank vs. Duvree, 7 Gill & J (Md) 78.

We are not in the dark as to what was decided by the District Court when the demurrer to the evidence was sustained.

The learned judge of the District Court had tried the case once before. The case had been tried on the theory that it was a case under the control of Congress; and that was not questioned. He had, as it eventually turned out, correctly instructed the jury as to the force and effect of the Act of Congress. But he had been reversed, and the case was remanded for a new trial, on the theory that it was not sufficient for the plaintiff to prove the use of a coupler denounced by the Act of Congress, but it devolved upon him to prove also that the condition of the coupler was the result of negligence on the part of the defendant, which he had failed to do. In this state of the case there was nothing for the court to do but sustain te demurrer; though if he had been permitted to give full force and effect to the Act of Congress, then under the evidence he would have overruled it, and there would have been no error in his decision.

In fine, the plaintiff contends for the following points:

1. The Safety Appliance Act of Congress was intended to act upon the defendant railway company as an inter-state carrier, and compel a proper equipment of all the cars used or handled in the pursuit of its business.

2. The purpose of the law is to protect life, not freight.

3. The law operates upon both inter-state and intra-state lines.

4. The fact of a car being loaded with inter-state traffic may be substantial and ultimate in a suit against an intrastate line, and also evidential and probative in a suit against an inter-state line to prove its inter-state character.

5. The stipulation admitted in evidence was relevant to prove the inter-state character of defendant's line, and its inter-state business which were expressly alleged. It also proved the use of the car in "moving inter-state traffic," and must be considered in evidence for that purpose, unless excluded by the trial court on a specific objection thereto, or on a motion to strike it out.

6. The failure to object to evidence at all, or at a proper time, or in a proper manner, is a waiver of the grounds of objection, and of the right to subsequently question the admissibility of the evidence.

7. A demurrer to evidence must be determined upon the sufficiency of the evidence, and although the petition failed to allege a material fact relied upon, if the fact is proved it must be considered on the demurrer to evidence notwithstanding the defect in the petition.

8. The evidence in the record was ample to justify a verdict for the plaintiff, and the decision of the District Court sustaining the demurrer to the evidence should be reversed, and the cause remanded to that court with directions to grant a new trial.

9. The law does not concern itself so much about what a car is loaded with, or whether it is loaded at all, or where it comes from, or where it is going to. It is the use of a car on its road, by an inter-state line, without a safe equipment. That is the evil aimed at. True, a single car loaded in one state and brought into another, or loaded in one state with freight to be taken to another, comes within the statute, and makes the company amenable to its penalties. But it is equally liable if it is an inter-state road, and uses an unequipped car for any purpose on its road, that is attended with danger to individuals.

It would have been sufficient to allege that the defendant used an unequipped car in moving intrastate traffic, and in that case it would have been necessary to add that the defendant was engaged in intra-state commerce as a business. When the latter is alleged it is unnecessary to add its use of any particular car for that purpose. The general includes the particular. This petition did not specifically allege that the defendant used the particular car in question in moving inter-state traffic, but it alleged more than that, namely, that it was engaged in the business of moving inter-state traffic, and used a car not equipped as required by law.

The fact that it loaded a car with salt at the Hutchinson Salt Works and moved it down to Hutchinson, and after putting it into a train, took it to Pine Bluff, Arkan-

sas, is evidence that it was an inter-state carrier, engaged in inter-state commerce, and was admissible to prove that allegation, which was a fact put in issue by the general denial. It is the use on its line of an unequipped car, by an inter-state carrier, that entitled the plaintiff to the protection of the statute. The petition alleges that the defendant is an inter-state carrier, by railroad, and that it used on its road a car that was not equipped as required by law, and that it was necessary, in consequence, for the plaintiff to go between the cars to make a coupling, and that he was injured in so doing. This makes a case under the statute.

The Supreme Court of Kansas concedes that the plaintiff's case was made out and he was entitled to recover if the accident had occurred after the Act of Congress of 1903, but that he could not recover, because the injury occurred prior to 1903, and that he could not recover under the Act of Congress of 1893 unless he alleged that the car which caused the injury was being used in moving inter-state traffic.

The requirements of railway companies to equip their cars with couplers, as designated in the statute of 1893, were not modified or changed in any respect by the amendment of March 2, 1903. The obligation to comply with the Act of 1893 was no less at the time the injury occurred to the plaintiff than it was in 1903 by the amended statute. The Act of 1893 plainly forbade the use of cars which could not be coupled together automatically and without the necessity of a man going between the ends of the cars. The risk of coupling and uncoupling was the evil sought to be remedied by the statute, and that risk was to be obviated by the use of

couplers of whatever design that would actually couple automatically when brought together.

In the case at bar, the coupler on the car by which plaintiff in error was injured was not in operative condition, and this necessitated his going between the cars, and the law was not complied with.

This subject was carefully considered by this court in the case of Johnson vs. Southern Pacific Ry. Co., 196 U. S. 1, where, referring to the Act of March, 1903, amending the prior Act of 1893 this court said: "As we have no doubt of the meaning of the prior law the subsequent legislation cannot be regarded as intended to operate to destroy it. Indeed, the latter Act is affirmative and declaratory and in effect only construed and applied the former Act." From this we see that there is no difference in the duties and liabilities of railway companies to equip their cars as prescribed by this statute, and only declared more positively the duties and liabilities under the former Act and made it certain what railroads, cars and other equipment should be subject to the provisions of this statute of 1893.

The contention of plaintiff in error before the trial court, Supreme Court of Kansas, and this Court, is that his petition charges the defendant with actionable negligence in not complying with the Act of Congress, in not having the car by which he was injured equipped with couplers as prescribed by the Act of 1893, and the evidence adduced fairly supports this claim.

It was contended before the Supreme Court of Kansas, and we now contend, that the fair, reasonable and proper construction and application of the Act of Congress of 1893 is that when railway companies, like the

defendant in this case, are engaged in inter-state traffic, it is their duty under the Act of Congress not to use, in connection with such traffic, cars that are not equipped as required by the Act. This duty of proper equipment is obligatory upon the company before it uses a car in connection with inter-state traffic, and it is not a duty which only arises when the car happens to be loaded with inter-state traffic. Therefore, it was not incumbent upon the plaintiff in this case to allege and prove that the car by which he was injured was loaded with inter-state traffic. The application to amend petition, although not deemed necessary to recovery, but deemed advisable to meet the suggestion of the Supreme Court, was permissible under Sections 133 and 139, Code of Civil Procedure, Statutes of Kansas, 1901, which are as follows:

"No variance between the allegations in a pleading, and the proof, is to be deemed material, unless it have actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it is alleged that a party has been so misled, that fact must be proved to the satisfaction of the court, and it must also be shown in what respect he has been misled, and thereupon the court may order the pleading to be amended upon such terms as may be just."

"The court may, before or after judgment, in furtherance of justice and on such terms as may be proper, amend any pleading, process or proceeding by adding or striking out the name of any party, or correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case, or conform the pleading or proceeding to the facts proved, when such amendment does not change substantially the claim or defense; and when any proceeding fails to conform in any respect to the provisions of this code, the court may permit the same to be made conformable thereto by amendment."

The language of Section 8 of the Act of March 2,

1893, is that railway companies must not use cars not lawfully equipped with couplers, coupling automatically by impact; in short, in operative condition, where the company is engaged in inter-state traffic.

The duty of the railroad company, by the plain, clear, unambiguous words of the statute, and by the decision of the courts, almost without exception, is to furnish coupler appliances of a character to obviate an employe's going into danger in making a coupling.

In view of the plain and obvious terms of this Act, and the decisions of the various courts thereon, we submit that the construction put upon it by the Supreme Court of Kansas was erroneous, and that the judgment should be reversed.

Respectfully submitted,

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C. V. FERGUSON,
Attorney for Plaintiff in Error.

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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1911

HENRY BRINKMEIER,
Plaintiff in Error,

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY,
Defendant in Error.

No. 206

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR

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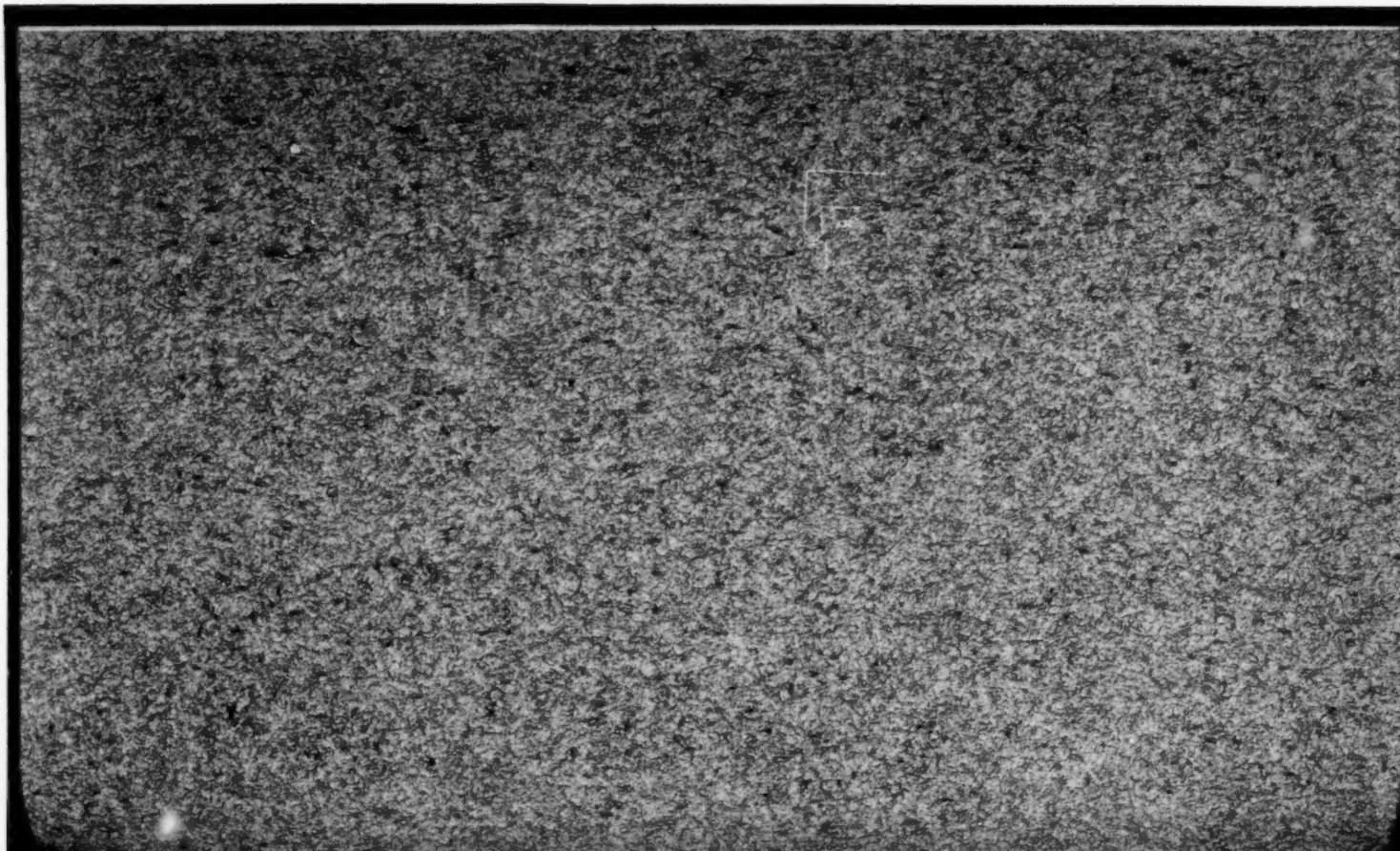

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STATEMENT.

The plaintiff in error, Henry Brinkmeier, commenced this action in the district court of Sedgwick county, Kansas, on the 15th day of March, 1901, (Record P. 3,) to recover damages for injuries alleged to have been sustained on the 12th day of November,

1900, while attempting to couple freight cars on a sidetrack of defendant in error at Hutchinson, Kansas.

On December 4, 1901, an amended petition was filed, (Rec. 4-7), which is the petition upon which the several trials were had.

The case was first tried in September, 1902, and the district court sustained a demurrer to the evidence introduced in behalf of plaintiff in error. This judgment was reversed by the Supreme Court of Kansas and the case remanded with directions to grant a new trial.

At the October, 1905, term of said district court the case was again tried and plaintiff recovered a judgment. This judgment was also reversed by the Supreme Court of Kansas.

Another trial was had at the April, 1908, term of said district court and a demurrer to the evidence introduced in behalf of plaintiff in error was sustained and the case dismissed. (Rec. 75.) This judgment was affirmed by the Supreme Court of Kansas, and the plaintiff then sued out the present writ of error.

It has been held repeatedly by the Supreme Court of Kansas that it is the duty of the master to exercise reasonable and ordinary care and diligence, and only such, in furnishing to his servant a reasonably safe place to work, and reasonably safe machinery, appliances or instrumentalities with which to perform his

work; that the master is not an insurer of the perfection of any of his machinery or appliances, and that it will be presumed, in the absence of evidence to the contrary, that he has performed his duty in such cases, and that the burden of proving otherwise will rest upon the party asserting that he has not done so; that where the servant seeks to recover damages for injuries resulting from the insufficiency of any of the machinery or instrumentalities furnished by the master, it not only devolves upon such servant to prove such insufficiency, but it will also devolve upon him to show either that the master had notice of the defects or insufficiencies complained of, or that by the exercise of reasonable and ordinary care and diligence he might have obtained such notice.

A. T. & S. F. Ry. Co. v. Wagner, 33 Kansas, 660;
A. T. & S. F. Ry. Co. v. Ledbetter, 34 Kansas, 326;
Carruthers v. C. R. I. & P. Ry. Co., 55 Kan. 600;
A. T. & S. F. Ry. Co. v. Tindall, 57 Kansas, 719.

It would seem to be plain from the amended petition, (Rec. 4-7) that this action was based upon the duty of defendant in error under the general law to exercise reasonable care to furnish reasonably safe machinery, appliances and tracks for the operation of its railroad. The case was tried upon this theory in the district court of Sedgwick county the *first* time and the railway company's demurrer to the evidence was sustained.

That judgment was reversed by the Supreme Court of Kansas, principally upon the ground that the

defects complained of were alleged to have been in the *original* construction of the coupling apparatus and that therefore notice to the railway company would be inferred.

Brinkmeier v. Mo. Pac. Ry Co., 69 Kansas, 738.

However, no such claim was made before, nor has been made since that hearing in the Supreme Court of Kansas, and is not made now.

Upon the second trial, without amending or offering to amend his petition, plaintiff in error abandoned the pretended contention that a structural defect existed in the appliances, and proceeded upon the theory that defendant in error had failed to comply with the provisions of the Act of Congress of March 2nd, 1893, known as the Safety Appliance Act, which he contended should be construed to mean that the railway company was an insurer of the perfection of the coupling appliances, and over the objections of defendant in error he was permitted to try the case in the district court on this theory.

In reversing the judgment rendered in his favor, the Supreme Court of Kansas held that the railway company had complied with the requirements of the Act of Congress relating to safety appliances when it equipped its cars with automatic couplers as prescribed by such act, and that it would not thereafter be subject to the conditions imposed by section 8 of such enactment on account of subsequent defects in the couplers which ordinary care and diligence could

not have avoided; and it was further stated in the opinion that, "Nothing whatever appears to indicate negligence on the part of the defendant."

Upon the rehearing of the case in that court, it was further held that the petition did not state a cause of action under the Act of Congress, and that the railway company was entitled to a reversal of the judgment upon that ground alone, although the court expressed itself as being satisfied with the position taken in its original opinion.

Mo. Pac. Ry. Co. v. Brinkmeier, 77 Kansas, 14; *Rehearing,* 77 Kansas, 22.

Upon the final trial in the district court, the evidence in behalf of plaintiff in error was precisely the same as that introduced upon the second trial above mentioned, and the pleadings were in no way amended.

The district court sustained the railway company's demurrer to the evidence, and plaintiff in error is now complaining of the judgment of the Supreme Court of Kansas which affirmed the judgment of the district court.

Brinkmeier v. Mo. Pac. Ry. Co., 81 Kansas, 101.

It will be observed from the decision (Rec. 80-84) the court again held the petition did not state a cause of action under the federal Safety Appliance Act, and that the trial court properly overruled the application to amend it; and in the opinion said:

> "The considerations already stated are determinative of the case and require an affirmance of the judgment, for the evidence did not warrant a recovery independent of the federal statute."

However, the court stated that "the circumstances give occasion to consider the other question presented —the meaning of that statute," and then proceeded to overrule the first paragraph of the syllabus in *Railway Company v. Brinkmeier*, 77 Kansas, 14, and held that the Act of Congress in question imposes upon the carrier the absolute duty to keep in good repair the equipment therein required, irrespective of any question of negligence.

In so construing the statute the court agreed with the contention of plaintiff in error, and its ruling is in harmony with the decisions of this court subsequently rendered.

C. B. & Q. Ry. Co. v. United States, 220 U. S., 559; 55 Law ed. 582.

Delk v. St. L. & S. F. Ry. Co., 220 U. S., 580; 55 Law ed., 590.

It will thus be seen that, although other matters are discussed in the brief of plaintiff in error, the real questions presented to this court are:

First.—Did the Supreme Court of Kansas err in holding that the petition (Rec. 4-7), *did not state a cause of action under the Act of Congress of March* 2, 1893;

Second.—Did the Supreme Court of Kansas err

in holding that the application of plaintiff in error to amend his petition was properly denied.

ARGUMENT.

NO FEDERAL QUESTION INVOLVED.

The validity of the Act of Congress was not drawn in question, and as shown, the Supreme Court of Kansas held that a construction of the act was not necessary to the determination of the case. Moreover, the court construed the act as plaintiff in error contended it should be.

> "A real and not a fictitious federal question is essential to the jurisdiction of this court over the judgments of state courts. The bare averment of a federal question is not in all cases sufficient; there must be at least color of ground for such averment."

Hamblin v. Western Land Co., 147 U. S. 531; 37 Law ed. 267;

Millingar v. Hartupee, 6 Wall., 258; 18 Law ed., 829;

Sawyer v. Piper, 189 U. S., 154; 47 Law ed. 757.

The questions here presented relate merely to pleading and practice under the laws of the state, and involve no federal questions.

Amendments of pleadings or other proceedings are as a rule matters of discretion with the trial court.

County of Buena Vista v. Iowa Falls & Sioux City Ry. Co., 112 U. S. 165; 28 Law ed. 680;

Gormley v. Bunyan, 138 U. S., 623; 34 Law ed., 1086;
Carr v. Nichols, 157 U. S., 370; 39 Law ed., 736;
Iowa Central Ry. v. State of Iowa, 160 U. S., 389; 40 Law ed., 467.

While it appears that no questions which this court has jurisdiction to review are presented, yet the material questions raised by the assignment of errors will be briefly considered.

THE PETITION DOES NOT STATE A CAUSE OF ACTION UNDER THE SAFETY APPLIANCE ACT.

It is apparent, we think, that plaintiff in error intended to state in his amended petition (Rec. 4-7) a cause of action based upon the duty of the railway company under the general law to exercise reasonable care to furnish reasonably safe appliances and tracks for the operation of its railroad. It contains the usual allegations for the statement of such a cause of action under the Kansas practice, and as already pointed out, the case was tried upon this theory the first time. The allegations of the petition plainly show that the thought of liability on the part of defendant in error upon the ground that it had failed to furnish a coupling appliance as required by the Act of Congress could not have been in the mind of the pleader.

The petition contained no allusion whatever to interstate commerce, except in a statement that defendant in error was doing business as a railway company as a common carrier into and through the counties of Sedgwick and Reno in the state of Kansas, and into the states of Colorado, Nebraska, etc. It was not averred that the cars in question were not equipped with couplers coupling automatically by impact, and which could be uncoupled without the necessity of men going between the ends of the cars; nor that it was the duty of the railway company to so equip its cars; nor that said cars were being used in moving interstate traffic. The petition makes no reference to the Federal Safety Appliance Act, and plaintiff in error makes no *complaint* that he was required to go between the ends of the cars to make couplings.

It is not claimed that it is necessary to plead the statute, or even to mention it; but we do contend that it was necessary under the Kansas practice for plaintiff in error to specifically set forth the facts which would bring him within the terms of the Act. He will not be permitted to state one cause of action in his pleadings and recover upon another.

It should be remembered that the injury complained of occurred on the 12th day of November, 1900; that this action was commenced on the 15th day of March, 1901; and that the amended petition in question was filed December 4th, 1901. (Rec. 4-7).

The Act of March 2nd, 1893, which was in force at the time of the injury, provided as follows:

> "Section 2. That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

It is urged that the petition states a cause of action under the Act, because it contains the allegations above referred to that the defendant railway company was doing business in several states. Under this averment proof might have been offered that the railway company was engaged in interstate commerce, if that was a material question; but the injury occurred *long prior to the amendment of 1903*, which enlarged the scope of the Safety Appliance Act. The provisions of the Act of 1893 were not applicable to *all* cars used on a railroad engaged in interstate commerce, but were limited to cars *"used in moving interstate traffic."* In every action based on *this* Act, either to recover a penalty or damages, the very first question that arises is, whether the car was used in moving interstate traffic. If it appears it was not, that is the end of the case. This question has been raised many times.

In *Johnson v. Southern Pacific Company*, 117 Fed., 470, the United States Circuit Court of Appeals said:

> "It is not, then, unlawful under this statute for a carrier to haul a car not so equipped which is either used in intrastate traffic solely, or which is not used in any traffic at all. It would be no violation of the statute for a carrier to haul an empty car not used to move any interstate traffic from one end of its railroad to the other. It would be no violation of the law for it to haul such a car in its yards, on its sidetrack, to put it into its trains, to move it in any manner it chose. It is only when a car is 'used in moving interstate traffic' that it becomes unlawful to haul it unless it is equipped as the statute prescribes."

In *Winkler v. P. & R. Ry. Co.*, (Del.) 53 Atlantic, 90, it was held:

> "That in an action for injuries received while coupling a tender to a car the claim being made that the tender was not properly equipped under the Act, *the burden is on the plaintiff* to show that the cars in question were being used in *moving interstate commerce* and were not properly equipped."

In *Rosney v. Erie R. Co.*, 135 Fed., 311, (C. C. A. Second Circuit), it was said that:

> "Assuming that the act applies to cars being shunted about in a switching yard where, from the nature of the business it would be impracticable, if not impossible, to connect up the air brakes, it cannot be invoked in the present instance for the reason that there is no proof that the engine and cars were *used* in interstate commerce."

It will be observed that the injury complained

of in the case last cited occurred on December 27th, 1901, and prior to the amendment, although the decision was rendered afterwards.

Although the judgment of the Circuit Court of Appeals in the *Johnson* case was reversed by this court, (196 U. S. 1; 49 Law ed., 363,) and while it was held that the provisions of the Act of Congress were under the circumstances of the case applicable to the dining car though *empty*, yet it is nowhere intimated in the opinion that it was not material to prove that the car in question was actually being "*used in moving interstate traffic*," but on the contrary it appears from that opinion that such proof was necessary, the court finding from the *facts* that the car was so used. In speaking of this car this court said:

> "It was being regularly used in the movement of interstate traffic, *and so within the law.*"

The plain inference from this language is that if the car had not been used in moving interstate traffic it would not have been "within the law."

In Southern Railway Co. v. United States, decided by this court October 30th, 1911, (32 Sup. Ct. Reporter, 2,) it was held that:

> "The original act as enlarged by the amendatory one is intended to embrace all locomotives, cars and similar vehicles used on any railroad which is a highway of interstate commerce."

In the opinion Mr. Justice Van Devanter points out that the second section of the original *act of March 2nd*, 1893, made it unlawful for "any such common carrier" to haul or permit to be hauled or used on its line of railroad any car *"used in moving interstate traffic"* not equipped with automatic couplers, and says:

> "The Act of March 2nd, 1903, amended the earlier one and enlarged its scope by declaring, *inter alia*, that its provisions and requirements should 'apply to all trains, locomotives, tenders, cars and similar vehicles used *on any railroad engaged in interstate commerce* * * * * * and to all other locomotives, tenders, cars and similar vehicles used in connection therewith.'"

Now if the act in force at the time of the injury to plaintiff in error applied only to cars "used in moving interstate traffic," and if, as seems clear, the *burden was upon plaintiff in error to prove* that the car was so used, it was necessary, in order to bring the action within the law, or to even suggest that its provisions had been violated, to *allege in the petition* that the car in question was being used in moving interstate traffic. Without such averment the cause of action stated, if any, was one entirely independent of the statute.

While it is true evidence in the form of a stipulation was introduced to prove that the car in question was loaded at Hutchinson, Kansas, and was conveyed and transported to Pine Bluff, Arkansas, yet this was done over the *objection* of defendant in er-

ror that the evidence was incompetent and irrelevant *under the pleadings in the case.* (Rec. 72.) This stipulation, as shown on its face, was made merely to avoid taking depositions and the right to object to its introduction as evidence *was expressly reserved.* (Rec. 72.)

There was no allegation in the petition which would render this evidence either competent or material, defendant in error did not consent to its introduction, and the fact that it was permitted to be introduced would not in any way alter the cause of action set forth in the petition. Proofs without proper averments are as unavailing as averments without proof.

As held by the Kansas Supreme Court, there was nothing in the petition to suggest even remotely that the car in question was used in moving interstate traffic, and therefore stated no cause of action under the federal statute.

The case relied upon in support of the contention that the petition states a cause of action under the Act of Congress is:

Voelker v. C. M. & St. P. Ry. Co., 116 Fed., 867.

The case was taken to the Circuit Court of Appeals of the Eighth Circuit, (129 Fed., 522) and that court practically held that the petition was not sufficient, but that under the particular circumstances of the case it would be considered as having been

amended. In that case the defendant made no objection whatever to the evidence introduced to prove that the car was being used in moving interstate traffic, and did not except to the instructions by which the court applied the Act of Congress to the case.

Furthermore it appears that the statute of Iowa prohibited the use of any car not equipped with automatic couplers so constructed as to enable any person to couple or uncouple them without going between them; and the Circuit Court of Appeals held that:

> "Other allegations bring the case equally within the jurisdiction of the court, whether the violation was of one statute or the other."

In the present case defendant in error did object to the introduction of the stipulation heretofore mentioned, and which was the only evidence introduced to prove that the car in question was used in moving interstate traffic, the right to make such objecjection being expressly reserved in the stipulation. (R. 72.) The objection made was not on account of any defect in the instrument itself which could have been obviated by further proof, but it pointed out that defendant in error was claiming that the *petition was fatally defective* if plaintiff in error was relying upon the Act of Congress, and that he had no right to offer *any* evidence upon the subject. The objection was a proper one under the Kansas practice and should have been sustained. But it certainly cannot be held that the introduction of incompetent and immaterial evidence over any objection of defendant in

error should be treated as setting up a new cause of action in the petition, *especially at a time when such cause of action was barred by the statute of limitations.*

The Supreme Court of Kansas held that such stipulation did not enlarge the issues made by the pleadings or operate as a waiver of any omission therein, and in this it was clearly right under the Kansas practice.

The Supreme Court of Kansas has held many times that a party must recover, if at all, upon the case made by his pleadings.

U. P. Ry. Co. v. Young, 8 Kansas, 658;
A. T. & S. F. Ry. Co. v. Irwin, 35 Kansas, 286;
Telle v. Rapid Transit Co., 50 Kansas, 455;
S. K. Ry. Co. v. Griffith, 54 Kansas, 428;
Brown v. C. R. I. & P. R. Co., 59 Kansas, 70;
Hunter Milling Co. v. Allen, 65 Kansas, 158;
S. & S. Co. v. Weeks, 66 Kansas, 800.

In the *Young* case cited above, the court held that an allegation that the employer knew of a fellow servant's incompetency was not supported by proof of employment without reasonable inquiry as to fitness.

It was held in the *Irwin* case that where it was alleged that the injury complained of was caused

by the negligence of the engineer, it was error for the court to present to the jury a question not made by the pleadings, by instructing them that plaintiff might recover if the injury was caused by the negligence of the fireman.

In the *Telle* case, the court said:

> "Of course where a party charges a specific act of negligence, he is concluded thereby and can not recover on matters not alleged."

In the *Griffith* case cited it was held that:

> "The negligence proven at the trial and found by the jury as a basis for a general verdict in favor of the plaintiff must correspond with the averments of the petition."

It was said in the *Hunter* case that:

> "A litigant may not allege one cause of action in his petition and orally state an entirely different one and recover upon it. The evidence and finding must be based upon and correspond to the facts set out in the petition."

In the *Wicks* case the court said.

> "It is elementary law in this state that the specific negligence complained of must be alleged in the petition and that recovery must be had upon such allegations, and not upon extraneous matters that may be developed upon the trial."

We are not contending for the enforcement of any strict or technical rule of pleading, but it would seem reasonable to urge that the settled rules of the

state should be observed in a case instituted in the Kansas Courts.

THE APPLICATION OF PLAINTIFF IN ERROR TO AMEND HIS AMENDED PETITION WAS PROPERLY DENIED.

After all the evidence was introduced on the last trial plaintiff in error made application to the court for leave to amend his amended petition "to conform to the facts proved," by alleging in substance that the car with which he was injured was used in interstate commerce. (Rec. 70.) This application was overruled.

The only evidence offered to prove that the car in question was used in moving interstate traffic was the stipulation referred to above, (Rec. 72,) and which was improperly admitted over objection of defendant in error.

This stipulation was made January 19, 1905, after the statute of limitations had run, and long prior to the last two trials, but at no previous time had any attempt been made to amend the petition. Plaintiff in error knew prior to the commencement of the last trial that the Kansas Supreme Court had held the amended petition did not state a cause of action under the Act of Congress and if he desired to amend his petition, in common fairness his application should have been made before the case was tried. Under the circumstances it would have been no abuse of discretion for the court to have denied

the application even if the amendment could have been properly allowed.

However, as stated, the injury complained of occurred on November 12, 1900. Under the Kansas statute an action to recover damages was barred in two years from that date.

A. T. & S. F. Ry. Co. v. King, 31 Kansas, 708.
A. T. & S. F. Ry. Co. v. Schroeder, 56 Kansas, 733.

The application to amend the petition was made nearly *eight* years after the injury. By this application plaintiff in error sought to introduce a new cause of action and one which was clearly barred by the statute of limitation. The Kansas Supreme Court has frequently held that such amendments are not permissible.

A. T. & S. F. Ry. Co. v. Schroeder, 56 Kansas, 731;
Kansas City v. Hart, 60 Kansas, 684;
M. K. & T. Ry. Co. v. Bagley, 65 Kansas, 188;
Holmquist v. Anderson, 67 Kansas, 861;
Becker v. A. T. & S. F. Ry. Co., 70 Kansas, 193.

And to the same effect is:

Union Pacific R. Co. v. Wyler, 158 U. S., 285; 39 Law ed., 983.

In the latter case it was held that:

"1. Where an amendment to a pleading alleges a new cause of action, the statute of limitations runs as to it until the amendment is made and may be pleaded thereto—although the amendment is made by consent, unless expressly renounced.

"2. Where an employe on a railroad is injured through the incompetency of a coemploye, in one state, and brings his action in another state for the injury, under the general law of master and servant, and afterwards amends his petition or complaint setting up a liability of defendant under the statute of the state of the injury making the master liable to a servant the same as to other persons, the amendment alleges a new cause of action against which the statute of limitations of the state of the action runs until it is put in.

"3. A departure in pleading may be either in the substance of the action or defense, or the law on which it is founded.

"4. A departure in law is a change from the assertion of a cause of action under the general or common law to a reliance upon a statute giving a particular or exceptional right."

We respectfully submit that under the authorities there was no abuse of discretion in overruling the application to amend and that the trial court could not have done otherwise.

As the evidence did not warrant a recovery on the cause of action stated in the petition, and as the

statute of limitation had barred an action under the Act of Congress before any attempt was made to amend the petition so as to show that the case fell within that Act as it existed when the injury occurred, the Supreme Court of Kansas was right in holding that no recovery by plaintiff in error is possible.

Respectfully submitted,

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DAVID SMYTH,
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Fort Scott, Kansas, February, 1912.